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No. 98- ----

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AT&T WIRELESS SERVICES and MCCAW CELLULAR COMMUNICATIONS, INC.,

Petitioners,

v.

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the express preemption provision of 47 U.S.C. § 332(c)(3)(A) -- which prohibits regulation by States of "the rates charged" by mobile telephone service providers -- nevertheless permits plaintiffs across the country to seek rate refunds through damages awards premised on violations of state statutory and common law.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner AT&T Wireless Services, Inc. declares that it is wholly owned by AT&T Corp., a New York corporation. Petitioner AT&T Wireless Services, Inc. has no publicly traded, nonwholly owned subsidiaries.

Petitioner McCaw Cellular Communications, Inc., merged into a subsidiary of AT&T Corp., and later changed its name to Petitioner AT&T Wireless Services, Inc. Petitioner McCaw Cellular Communications, Inc. no longer exists as a separate entity.

AT&T Corp. has an equity or debt interest in the following publicly traded companies:

AT&T Credit Holdings, Inc.;

American Mobile Satellite Corporation;

Lanser Wireless Inc. (Canada); and

Teleport Communications Group Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners AT&T Wireless Services, Inc. and McCaw Cellular Communications, Inc. (jointly, "AT&T Wireless"), respectfully request that a writ of certiorari issue to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The *en banc* decision of the Washington Supreme Court is reported at 136 Wash.2d 322, 962 P.2d 104 (1998) (Appendix to Petition for Certiorari ("App.") 1a-32a). The order of the

Superior Court of Washington for King County dismissing plaintiffs' claims is not reported (App. 33a-34a).

JURISDICTION

The judgment of the Washington Supreme Court was entered on September 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision in this case is the Supremacy Clause in Article VI of the United States Constitution, which provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

U.S. Const. art. VI, cl. 2.

The statutory provision involved in this case is 47 U.S.C. § 332(c)(3)(A) (1994), which provides, in pertinent part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

STATEMENT OF THE CASE

In 1993, Congress amended the Communications Act of 1934 ("Communications Act") to alter fundamentally the statutory system regulating wireless telecommunications services ("wireless services") in an effort to foster that industry's continued growth and development. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66,

6002(b), 107 Stat. 312, 392-93 (codified in scattered sections of 47 U.S.C.). Recognizing that wireless services "by their nature, operate without regard to state lines," Congress sought to ensure uniform regulation for these services by divesting States of "any authority to regulate . . . rates charged" by wireless telephone providers. 47 U.S.C. § 332(c)(3)(A) (1994) ("Section 332").[1]

In a decision flatly contrary to Congress' express efforts to prohibit state regulation of wireless rates, the Washington Supreme Court held that state common law and statutory actions seeking refund damages could proceed even if the award of damages in those cases will require courts retroactively to adjust wireless rates on a class-wide basis. The court's misguided decision subverts Congress' intent in an area of critical importance to the national telecommunications infrastructure. If not corrected, the holding below imperils the continued growth and development of wireless communications services that benefit citizens nationwide. Moreover, the Washington Supreme Court's decision deepens the already growing conflict among state and federal courts and administrative agencies regarding the preemptive reach of Section 332 and the proper legal analysis for deciding whether an action for monetary damages constitutes state rate regulation that is expressly preempted by federal law.

A. Statutory And Regulatory Background.

Since its inception in the early 1980's, the cellular (or more broadly, the "wireless") telephone industry has developed at an

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[1] "Commercial mobile radio service" is defined to include the cellular service provided by AT&T Wireless. The phrase includes all mobile forms of wireless communications, including cellular, personal communications service, and airplane telephone service. *Equal Access*, 9 F.C.C.R. 5408, 5416-17 (1994).

astounding rate. In just over a decade, the number of cellular telephone subscribers in the United States increased from fewer than a 100 thousand subscribers in 1984 to more than 24 million in 1995.[2] Annualized figures for 1998 indicate that the U.S. cellular industry employs more than 113,000 individuals and serves in excess of 60 million subscribers.[3] As a result of this massive and sustained growth, wireless telephone services comprise an "integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

Cellular or wireless telephone service differs substantially from traditional home or office telephone service because wireless service operates largely without regard to state lines. Cellular service areas frequently include portions of multiple states. Further, because wireless telephones are portable, they routinely are used in more than one state. Indeed, a wireless call may originate in one state, the caller may drive into a second state, and the call may be routed and switched to its final destination via a third state. See Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 Fed. Com. L.J. 547, 550 (1998).

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[2] *See* Alfred Lee, *Land Mobile Radio Services*, in *NTIA Telecom 2000, Charting the Course for a New Century*, 286 & Table 1 (1988); U.S. Dept. of Commerce, *U.S. Industrial Handbook, Forecasts For Selected Manufacturing and Service Industries* 30-6 (Jan. 1994); *see also* John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 Fed. Com. L.J. 247, 256 (1995).

[3] *See* Cellular Telecomm. Indus. Ass'n, *Annualized Wireless Industry Data Survey Results, June 1985 to June 1998* (1998) ‹http://www.wow-com.com/professional/reference/datasurvey/view_98datasurvey2.gif› (hereafter, "*CTIA's Annualized Survey*").

Cognizant both of the sustained growth and interstate character of wireless telephone services, in 1993, Congress amended the Communications Act to alter fundamentally the statutory structure governing wireless services in an effort to eliminate unnecessary and conflicting regulatory barriers and to foster continued growth and development. This new legislation responded to calls for measures that would encourage further investment in wireless infrastructure. H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

Essential to this new statutory regime was Congress' command, reflected in Section 332, that "no state or local government shall have authority to regulate 'the entry or the rates charged'" for wireless telephone service. See *State of California Regulatory Authority Over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7487 (1995) (quoting 47 U.S.C. § 332(c)(3)(A)). As explained by the FCC, Section 332 was critical because Congress sought "to establish a *national* regulatory policy for [wireless communications], not a policy that is balkanized state-by-state." *Id.* at 7499.[4] Put another way, preemption of state rate regulation plays a critical role in Congress' statutory scheme because it provides for a uniform, stable and predictable regulatory environment:

> Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.

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[4] President Clinton lauded the legislation overhauling the wireless regulatory regime because it "'creates the infrastructure to develop the most advanced commercial wireless communication networks the world has ever known [and will] allow an industry to grow by tens of billions of dollars by the end of the decade, producing hundreds of thousands of new high-skilled, high-wage jobs.'" Kennedy & Purcell, 50 Fed. Com. L.J. at 549-50 (quoting President Clinton, Remarks at a Communications Technology Demonstration (July 22, 1993)).

> Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

Regulatory Control of the Rates of Wholesale Cellular Service Providers, 10 F.C.C.R. 7025, 7031-32 (1995) (footnotes omitted). The only regulatory authority left to the States was regulation of "terms and conditions" of wireless service other than "rates." 47 U.S.C. § 332(c)(3)(A) (1994).[5] This legislative overhaul has produced enormous public benefits; since 1993, for example, the wireless industry has attracted almost $40 billion in additional capital investments. See *CTIA 's Annualized Survey supra* note 3.

B. The Proceedings Before The Trial Court.

AT&T Wireless has direct and indirect ownership interests in wireless license holders that provide wireless telephone service to more than 9 million subscribers in all 50 states. AT&T Wireless offers its customers many different rate plan options, including a number of nationwide discounted calling plans. Virtually all of AT&T Wireless' rate plans, like those of most competing wireless providers, include a per-minute charge for airtime use. And, like other wireless (and long-distance) carriers, AT&T Wireless follows the long-standing, industry-

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[5] As this Court has recognized, however, "[r]ates . . . do not exist in isolation" and "have meaning only when one knows the services to which they are attached." *AT&T Co.* v. *Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998). As a result, this Court warned that lower courts must be cognizant that a claim for "excessive rates can be couched as a claim for inadequate services and vice versa." *Id.*

wide practice of "rounding up," *i.e.*, charging customers for telephone services based on the length of the telephone call using full-minute increments.[6] Put another way, customers are charged for a full minute when they make a wireless call that lasts only part of a minute.

On October 24, 1995, Plaintiffs-Respondents Coryelle Tenore, Charles F. Peterson and Karen M. Cole ("Respondents") filed a class-action lawsuit against AT&T Wireless, raising state law claims for breach of contract, misrepresentation, fraud, and violations of the Washington Consumer Protection Act. App. 4a. Respondents' claims are based on allegations that AT&T Wireless did not adequately disclose its practice of charging customers in full-minute increments. App. 3a. Respondents' Second Amended Complaint includes a putative "regionwide" class of all AT&T Wireless customers in Washington, Oregon, Alaska, Idaho and Utah who "have been subject to having their airtime charges rounded up to the next full minute." App. 39a.

Although Respondents disclaim any effort to "change, diminish, or modify the rates being charged by [AT&T Wireless]," App. 37a, the relief they seek, if permitted, would do precisely that. Indeed, in their complaint, Respondents expressly ask for "compensatory damages in the form of a refund of the difference between the amounts charged by [AT&T Wireless] and the amount, if any, which cellular users would have incurred if [AT&T Wireless] did not engage in this

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[6] Charging customers in full-minute increments is a standard practice among providers of long distance, cellular, airplane telephone, and other telecommunications services. Indeed, as the Washington Supreme Court noted, "[l]ong distance carriers have historically used full-minute billing." App.3a n.6; *see also Alicke* v. *MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (noting that, until recently, "long distance service has always been listed and billed" in "whole-minute increments").

practice." *Id.*[7] Thus, the relief sought by Respondents requires the court to impose both a billing increment other than the full-minute system used by AT&T Wireless and a corresponding "rate" applicable to that new increment. As a result, the effect of the relief sought by Respondents would be to require wireless providers retroactively to charge their customers different rates depending on the vagaries of law of individual states.[8]

Respondents' lawsuit is but one in a series of such lawsuits filed across the country against virtually every service provider in the wireless industry attacking how wireless calls are charged. Since 1995, more than 45 of these cases have been filed against wireless carriers throughout the country. App. 52a-57a (listing cases filed against wireless and long-distance carriers since 1995). All told, the potential damages sought in these lawsuits amount to many hundreds of millions of dollars. Indeed, in this case alone, Respondents claim that AT&T Wireless' practice of charging its customers in full-minute increments "result[ed] in

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[7] Respondents also seek an injunction preventing AT&T Wireless from charging customers based upon the practice of "rounding up *without disclosing the practice*." App. 37a (emphasis added). That request for injunctive relief is particularly peculiar because Respondents have no need for such future disclosures given that they admittedly are aware that AT&T Wireless bases its wireless telephone rates on the practice of rounding each telephone call to a full-minute increment. App. 36a. In any event, such claims for future disclosures are moot because, as explained in a separate case, "AT&T Wireless's promotional materials now explain the practice of rounding up in connection with billing for calls." *Hardy* v. *Claircom Communications Group, Inc.*, 937 P.2d 1128, 1132 n.3 (Wash. App. 1997).

[8] *Cf. Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163 (1922) (rejecting claim for damages based on allegations of payment "of a rate higher than that which would have otherwise prevailed" because "the amount recovered might, like a rebate, operate to give [the plaintiff] a preference" over other customers).

millions of dollars of excess billing by [AT&T Wireless]." App. 36a.

The monetary relief being sought in these cases -- widespread refunds for millions of customers -- necessarily will require triers of fact retroactively to adjust wireless rates. Indeed, these class action lawsuits propose to resolve claims on a statewide, regionwide, even nationwide basis going back as many as six years.[9] In other words, plaintiffs across the country are asking courts to apply state law to regulate rates, not just for one or two customers, and not just for a single carrier's entire customer base, but for virtually the entire wireless industry.

On April 29, 1997, AT&T Wireless filed a motion to dismiss Respondents' claims because, among other things, they were preempted by federal law. App. 4a. In support of its motion, AT&T Wireless demonstrated that an award of refund damages based on a new billing increment would amount to state rate regulation in violation of Section 332. Respondents claimed that Section 332 does not preempt their claims because they challenge only the adequacy of AT&T Wireless' disclosures concerning its practice charging customers in full-minute increments. App. 6a.

In reply, AT&T Wireless explained that Section 332 preempts state law claims -- even failure-to-disclose claims -- when, as here, an award of damages would result in the regulation of wireless telephone rates. That is, an award of refund damages in this case would result in rate regulation

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[9] *See, e.g., Tenore* v. *AT&T Wireless Servs., Inc.*, 962 P.2d 104, 105-06 (Wash. 1998) (regionwide class); *DeCastro* v. *AWACS, Inc.*, 935 F. Supp. 541, *appeal dismissed*, 940 F. Supp. 692 (D.N.J. 1996) (statewide class); *Carroll* v. *Cellco Partnership*, Docket Nos. AM-001316-96T3, AM-001303-96T3 (N.J. Super. Ct. App. Div., June 25, 1997) (nationwide case).

because the court retroactively must determine what AT&T Wireless may charge based on a different billing increment than the full-minute rate charged by AT&T Wireless. However labeled, the clear and direct effect of the relief Respondents seek would be to regulate AT&T Wireless' rates under state statutory and common law standards. See *Competitive Market Conditions with Respect to Commercial Mobile Servs.*, 10 F.C.C.R. 8844, 8868 (1995) (billing increment is a necessary component of wireless rates).[10]

While AT&T Wireless' Motion to Dismiss was pending, the Washington State Court of Appeals held that a virtually identical full-minute billing claim was preempted by Section 332. *Hardy* v. *Claircom Communications Group*, 937 P.2d 1128 (Wash. App. 1997).[11] The trial court in the present case agreed with the *Hardy* Court's analysis, concluded that *Hardy* also controlled the present case, and dismissed Respondents' claims because they too were preempted by Section 332. App. 33a-34a.

C. The Washington Supreme Court's Decision.

Respondents appealed the trial court's decision directly to the Washington Supreme Court, arguing that their claims were not preempted and that the *Hardy* decision should not control.

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[10] *See also Black's Law Dictionary* 1261 (6th ed. 1990) (defining "rate" as "a charge, valuation, payment or price fixed according to ratio, scale or standard").

[11] The plaintiff in *Hardy* asserted the same claims against Claircom Communications Group, a division of AT&T Wireless that provides airplane telephone service for airline passengers. *Id.* at 1130. The *Hardy* Court held that Section 332 preempted those claims because an award of refund damages would require the court to engage in precisely the sort of rate regulation that Congress prohibited. *Id.* at 1133.

On September 10, 1998, the Washington Supreme Court reversed the trial court's decision, holding that Respondents' misrepresentation, fraud, and consumer protection act claims were not preempted by Section 332. App. 31a-32a.[12] After canvassing the many conflicting decisions relied upon by Respondents and AT&T Wireless, App. 17a-23a, the lower court ultimately relied upon *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976) -- a decision which, unlike this case, involved (1) a statutory scheme that lacked any express preemption provision, *id.* at 301, and (2) a challenge to a practice for which the federal agency charged by Congress with regulatory authority over the practice expressly permitted individuals to advance state common-law claims, *id.* at 306 -- to hold that there was "sufficient reliable authority . . . to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332." App. 25a.

In essence, the court ruled that Section 332 did not preempt Respondents' state law claims because there were no filed tariffs:

> [A] challenge to a practice that is not governed by a tariff filing does not implicate the "conflict" inherent in contesting a . . . rate expressly regulated by an agency and . . . any impact on rates is "merely incidental."

App. 31a.[13] As a result, the Washington Supreme Court held that "the State law claims brought by [Respondents] and the

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[12] Respondents did not appeal the dismissal of the breach of contract claims. App. 4a n.13.

[13] In fact, the FCC continues to regulate wireless rates in the absence of filed tariffs under 47 U.S.C. § 201(b) (1994). *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. 1411, 1479 (1994).

damages they seek do not implicate rate regulation prohibited by Section 332." App. 25a.[14]

REASONS FOR GRANTING THE PETITION

Review of the Washington Supreme Court's decision is urgently needed. Despite Congress' clear statement in Section 332 that States cannot regulate wireless rates, the Washington Supreme Court has allowed state law claims for refund damages that will require state courts to engage in prohibited rate regulation. As a result, the Washington Supreme Court's decision thwarts Congress' intent to remove States from the rate regulation arena and to free wireless providers from conflicting state rate regulations that will otherwise threaten the development of an integral part of the

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[14] The *Tenore* court expressly refrained from addressing the ultimate merits of Respondents' state law claims. App. 26a n.108. Although the Washington Supreme Court envisioned further proceedings before the trial court, its decision falls comfortably within the jurisdiction of this Court. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). Here, the Washington Supreme Court squarely confronted and decided the issue of federal preemption under Section 332; reversal of the *Tenore* decision will preclude further litigation in this case; and without immediate review the Washington Supreme Court's decision "might seriously erode federal policy" pertaining to the uniform federal system of regulation of a fast-growing and critical component of the national telecommunications infrastructure. *See id.*; *see also Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988) (holding that state-court judgment ripe for review despite fact that "further proceedings will be held on remand" because "[t]he critical federal question -- whether federal law preempts such proceedings . . . already [has] been answered by the State Supreme Court"); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988) (holding that State Supreme Court's rejection of federal preemption claim was "a final judgment for purposes of 28 U.S.C. § 1257(2)"); *cf. American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 225-26 (1995) (reviewing, on the merits, Illinois Supreme Court's denial of a motion to dismiss state law claims of breach of contract and Illinois' Consumer Fraud and Deceptive Business Practices Act based on federal preemption).

national telecommunications infrastructure. Indeed, the decision below gives courts *carte blanche* to apply state law retroactively to adjust rates for wireless carriers through damage awards.

In doing so, the Washington Supreme Court's decision undermines a core federal policy that Congress had hoped to further by enacting Section 332 -- providing regulatory uniformity and stability for the wireless telephone industry. Indeed, rather than uniformity and stability, the Washington Supreme Court's decision promises increased regulatory uncertainty. The impact of this case is magnified because scores of similar class action lawsuits are pending against virtually every major wireless carrier in the country. The Washington Supreme Court's decision highlights and adds to the already widespread conflict and confusion among state and federal courts and agencies.

Finally, the Washington Supreme Court's decision conflicts with this Court's most recent opinion on the meaning of rates under the Communications Act; decisions from this Court establishing that awards of refund damages constitute rate regulation; and decisions by this Court establishing the standards for deciding the scope of express preemption provisions.

THE WASHINGTON SUPREME COURT'S DECISION CONTRAVENES THE INTENT OF CONGRESS AND, IF UNCORRECTED, WILL HAVE A PROFOUND, ADVERSE IMPACT ON THE WIRELESS INDUSTRY.

Virtually every major wireless carrier in the country has been the target of class action lawsuits attacking how their calls are charged. Although many of these cases are disguised as "disclosure" claims, they all assert that customers have been overcharged and seek damages in the form of retroactive refunds. In a very practical way, then, Congress' statutory structure governing an important component of the national telecommunications industry has been imperiled.

Section 332 defines the balance of power between the state and federal governments over the regulation of the wireless industry and reflects Congress' determination that federal law should preempt all state regulation of rates charged by wireless carriers:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A) (1994). As demonstrated above, see *supra* 3-6, Section 332 was considered necessary by Congress and the FCC to ensure a predictable and uniform regulatory policy for wireless rates by eliminating state-by-state determinations of what and how rates should be charged for services that routinely cross state boundaries and are otherwise regional or national in scope. See *State of California Regulatory Authority Over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7499 (1995) (explaining that Congress intended that Section 332 would "establish a *national*

regulatory policy for [wireless services], not a policy that is balkanized state-by-state") (footnote omitted). Congress' goals of ensuring "regulatory symmetry" and providing a "stable and predictable" regulatory environment for wireless carriers are threatened by conflicting decisions in the federal and state courts interpreting the proper scope of Section 332.

A. There Is A Patchwork Of Conflicting And Confusing Decisions Interpreting Section 332.

The Washington Supreme Court's decision starkly illustrates the confusion in state and federal courts and state and federal regulatory agencies over the meaning and scope of Section 332.

1. Quite literally, state and federal decisions involving Section 332 preemption are all over the map. For example, at least one court has concluded that *all* state law claims having an impact on wireless rates are preempted by Section 332. See *Simons* v. *GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. Apr. 11, 1996) ("[A]ll state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A)") (App. 62a). A number of other courts have ruled that Section 332 preempts state law claims challenging the reasonableness of wireless billing practices. See, *e.g.*, *Ball* v. *GTE Mobilnet of California, Ltd.*, No. 98AS03811 (Cal. Super. Ct. (Sacramento County) Nov. 17, 1998) (dismissing "rounding up" and related claims under Section 332 because they challenged the method of calculating the length and rate for wireless service) (App. 63a-64a). Several courts have ruled that even "disclosure" claims are preempted, if the request for damages requires courts retroactively to adjust rates. See, *e.g.*, *Rogers* v. *Westel-Indianapolis Co.*, No. 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) (App. 65a-66a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a). In

contrast, at least one court has refused to preempt any disclosure claims, regardless of the damages sought and regardless of how directly the claims challenged wireless rates. See *Carroll* v. *Cellco Partnership*, Docket Nos. AM-001316-96T3 and AM-001303-96T3 (N.J. Super. Ct., App. Div., June 25, 1997) (App. 70a-71a).[15]

The FCC's decision, based on legislative authority, to lift the filed tariff requirement for wireless carriers has resulted in much of the confusion among the lower courts. See *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. at 1479 (citing 47 U.S.C. § 332(c)(1)(C)). Although the FCC's ruling was meant to ease the regulation of wireless services and to provide an opportunity for market forces to set rates in this vigorously competitive industry, ironically, courts have interpreted the absence of a filed tariff requirement as a basis for concluding that state law regulation in the form of rate refund damages claims survive despite the express preemption provision of Section 332. In essence, many courts have unduly limited the preemptive reach of Section 332 by reasoning that, because the challenged rates were not subject to filed tariffs, retroactive state law adjustments to those rates and rate structures are not preempted at all. See, *e.g.*, App. 25a.

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[15] Courts applying the doctrine of "complete preemption" have likewise disagreed about whether the preemptive force of the Communications Act, including Section 332, is sufficiently strong to support removal of state law claims to federal court. *See, e.g., Lee* v. *Contel Cellular of the South, Inc.*, 1996 U.S. Dist. LEXIS 19636, at *9, *13-*14 (S.D. Ala. 1996) (holding that contract claims completely preempted by Section 332; tort claims not completely preempted); *In re Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193, 1205-06 (E.D. Pa. 1996) (holding that, under the artful pleading doctrine, contract and statutory claims were not removable to federal court, but tort claims were removable); *Sanderson* v. *AWACS, Inc.*, 958 F. Supp. 947, 956-58 (D. Del. 1997) (no claims were completely preempted).

2. State regulatory agencies likewise disagree over the scope of Section 332. For example, California's Public Utilities Commission ("CPUC") has ruled that under Section 332 it has no jurisdiction to award refund damages because to do so requires rate setting. See *Nova Cellular West, Inc.* v. *AirTouch Cellular of San Diego*, Case No. 98-02-036 (CPUC Sept. 3, 1998) (ordering wireless carrier to adjust its rates and pay a refund is ratemaking) (App. 75a-77a, 78a).[16] Other state regulatory agencies have read Section 332 to be far more limited, concluding that Section 332 preempts only specific determinations of the reasonableness of wholesale wireless rates. See, *e.g.*, *Westside Cellular, Inc.* v. *GTE Mobilnet, Inc.*, 1995 Ohio PUC LEXIS 240, at *6-*9 (Mar. 23, 1995).

The uncertain scope of Section 332 also has fostered significant confusion in a host of proceedings before the Federal Communications Commission ("FCC") and threatens to undermine other federal policies of that agency. For example, "universal service" funding designed to make telephone service reasonably priced and broadly available across the nation depends, in part, on substantial payments by wireless carriers based on their charges for both interstate and intrastate services. See 47 U.S.C. § 254; *Federal-State Joint Board on Universal Serv.*, 12 F.C.C.R. 8776, 9175, 9181 (1997). Effective implementation of this important policy rests on the assumption that "section 332(c)(3) . . . alters the 'traditional' federal-state

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[16] There, a reseller challenged a wireless carrier's refusal to provide electronic billing service with certain rates. The CPUC rejected the reseller's argument that the case was a billing dispute and not a dispute about rates: "In this case, mandating that AirTouch provide particular services at given rates is functionally identical to requiring AirTouch to provide its given services at particular rates. Both actions would constitute 'rate regulation,' and neither remedy is permitted under Section 332." *Id.* (App. 78a); *see also California Wireless Resellers Ass'n v. Los Angeles Cellular Telephone Co.*, No. 98-06-055 (CPUC Nov. 5, 1998) (App. 81a-87a).

relationship with respect to [wireless services] by prohibiting states from regulating rates," and will be undermined if these charges are subject to retroactive adjustment through state law damage awards. See *Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 5318, 5489 (1997).[17] Yet, with respect to intrastate services (a line that is, by its nature, difficult to draw in the wireless context), there has been no conclusive determination regarding the scope of FCC jurisdiction to regulate carriers' billing practices. See *Truth-in-Billing and Billing Format*, 1998 F.C.C. LEXIS 4849 ¶ 13 at *18-*19 (Sept. 17, 1998) (Notice of Proposed Rulemaking seeking comment on "whether the Commission has jurisdiction" to regulate carriers' billing practices).[18]

In short, the lower courts and federal and state regulatory agencies are divided on this important and recurring question of federal law: Whether Section 332 preempts state law claims if, to measure an award of money damages, a court must apply

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[17] *See also Metro Mobile Cts., Inc.*, Nos. CV-95-0051275S, CV-95-05500965, 1996 WL 737480 (Conn. Super. Ct. Dec. 11, 1996); *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 800 (8th Cir. 1997) (regulation of interconnection fees charged by local exchange carriers to wireless carriers), *cert. granted*, 118 S. Ct. 879 (1998).

[18] Separately, the FCC opened a proceeding following a federal court's determination -- contrary to the decision below -- that a primary jurisdiction referral on the issue of the scope of Section 332 rate regulation was appropriate. *See* FCC Pub. Notice, DA-97-2464 (Nov. 24, 1997) (following referral from *Smilow* v. *Southwestern Bell Mobile Sys.*, 1997 U.S. Dist. 19453, *10-11 (D. Mass. July 11, 1997)). The settlement of a related case against the same wireless carrier, however, has effectively disposed of the "rounding up" claims presented to the FCC. *See Penrod* v. *Southwestern Bell Mobile Sys.*, No. 96-L-132 (Ill. Cir. Ct. (Madison County)); *cf.* FCC Pub. Notice, DA-98-945, 1998 F.C.C. LEXIS 2332, *1 (May 18, 1998) (seeking comments regarding alleged failure to disclose in filed tariffs the practice of charging customers in full-minute increments).

state law to determine retroactively the appropriate charges for wireless service. Resolution of that issue by this Court potentially would be controlling in dozens of pending class action lawsuits involving virtually every major wireless carrier and their tens of millions of customers.

B. The Washington Supreme Court's Decision Provides An Ideal Vehicle For This Court To Resolve The Conflicts Regarding The Preemptive Scope Of Section 332.

The Washington Supreme Court's decision squarely presents the issue whether courts can, in effect, retroactively set wireless rates when awarding damages pursuant to state statutory and common law causes of action.

In Section 332, Congress chose clear and unmistakable language dictating that no State "shall have any authority to regulate . . . rates." 47 U.S.C. § 332(c)(3)(A) (1994). Despite that expansive prohibition, Respondents explicitly sought compensatory damages in the form of a rate refund based upon what they would have been charged had AT&T Wireless not engaged in the challenged conduct. App. 4a. The Washington Supreme Court expressly sanctioned such claims by holding that the damages sought by Respondents did not "implicate rate regulation." App. 25a. As a result, the Washington Supreme Court's decision squarely presents the overarching issue of the proper scope of Section 332. Subsumed within this overarching question are several recurring issues of national importance that have generated conflicts among the lower courts and thus warrant resolution by this Court.

First, whether an award of damages is permissible requires a determination of what types of claims constitute a challenge to wireless service "rates." In a related context, this Court recently cautioned against adopting too restrictive a definition of "rates." *Central Office Telephone*, 118 S. Ct. at 1963. In

Central Office Telephone, long distance resellers alleged that AT&T Corp., in violation of state contract and tort law, had promised, but never delivered, various service and billing options in addition to those set forth in the tariffed rates filed with the FCC. The Court held that both claims were preempted under the filed tariff doctrine, rejecting the Ninth Circuit's holding that the claims did not involve rates or ratesetting. *Id.* at 1963.

> The Ninth Circuit thought the filed-rate doctrine inapplicable "[b]ecause this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing." Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.

Id. (quoting *Central Office Telephone, Inc.* v. *AT&T Co.*, 108 F.3d 981, 990 (9th Cir. 1997) (alteration in original; citation omitted)).

Here, the Washington Supreme Court dismissed *Central Office Telephone* as irrelevant because that case involved the "filed tariff" doctrine. App. 11a n.48. Instead, the court interpreted the term "rates" narrowly, holding that the damages sought by Respondents do not represent a challenge to the "rates" for wireless service provided by AT&T Wireless. App. 25a. But, as the FCC has recognized, the billing increment is an integral component of a wireless rate. See *Competitive Market Conditions with Respect to Commercial Mobile Servs.*, 10 F.C.C.R. at 8868. Thus, regardless whether there is a tariff, wireless rates have meaning only when one knows the billing increment by which they are calculated. The contrary conclusion by the Washington Supreme Court conflicts with this Court's analysis in *Central Office Telephone* and the decisions

of other state and federal courts that have, consistent with *Central Office Telephone*, adopted a broader and more practical reading of the term "rates" with respect to Section 332.[19]

Second, this case also presents the issue whether an award of money damages amounts to "regulation" within the meaning of Section 332. Generally, the common-sense and ordinary meaning of "regulate" is broad: to regulate is to "govern or direct according to rule," to "fix, establish, or control," and to "subject to governing principles or laws." *Black's Law Dictionary* 1286 (6th ed. 1990).[20] Thus, damage awards unquestionably *can* constitute a form of state regulation that is indistinguishable from legislative or executive activity. As this Court has held:

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959); see also *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring) ("'[state] regulation can be as effectively exerted through an award of damages as through some form of preventative relief.'") (alteration in original)

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[19] *See Simons* v. *GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. Apr. 11, 1996) (App. 62a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a); *see also Marcus* v. *AT&T Corp.*, 938 F. Supp. 1158, 1170 (S.D.N.Y. 1996), *aff'd*, 138 F.3d 46 (2d Cir. 1998); *Nova Cellular West, Inc.* v. *AirTouch Cellular of San Diego*, No. 98-02-036 (CPUC Sept. 3, 1998) (App. 75a-77a).

[20] *See also Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1543 (M.D. Ala. 1992); *Bishop v. Provident Life and Casualty Insurance Co.*, 749 F. Supp. 176, 178 (E.D. Tenn. 1990).

(quoting *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)); *id.* at 510 (O'Connor, J., concurring in part and dissenting in part) ("A majority of the Court agreed that state common-law damages actions do impose 'requirements'"); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981). This Court, however, has not established a definitive framework for determining whether damage awards do, in fact, constitute "regulation," and the lower court decisions on precisely that important issue are in conflict. Compare App. 25a with *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a).

Here, the Washington Supreme Court acknowledged that "damage awards [may be] tantamount to rate regulation," App. 21a & n.87, but ruled that this legal conclusion is reserved for cases where "the 'filed rate' doctrine was implicated or the claims were completely preempted by the agency's exclusive and plenary authority." App. 22a. Put another way, the court disregarded the practical reality that refund damages require retroactive ratesetting on the theory that state law is preempted only where federal rate regulation occurs through the formal filed tariff process. That holding conflicts with decisions by other courts, which have concluded that similar claims for damages constitute state rate regulation prohibited by Section 332 regardless of any tariff filing. See *Simons* v. *GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. Apr. 11, 1996) (App. 62a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a).[21]

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[21] *See also Arkansas La. Gas*, 453 U.S. at 578-79 (damage actions are disguised retroactive rate adjustments); *Fax Telecommunicaciones v. AT&T Co.*, 952 F. Supp. 946, 954 (E.D.N.Y. 1996) (enforcing a contract rate that requires a court to determine a reasonable rate is unlawful ratemaking); *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1119-22 (S.D.N.Y. 1992) (refund damages award would effectively require a court to determine a reasonable rate), *aff'd*, 27 F.3d 17 (2d Cir. 1994).

Accordingly, this case squarely presents the issue whether damage awards can amount to "rate regulation prohibited by Section 332." App. 25a.

Third, and more generally, the Washington Supreme Court's decision conflicts with the standards established by this Court for analyzing whether state law claims are preempted under an express preemption provision. See, *e.g.*, *American Airlines*, 513 U.S. at 226-27; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This Court consistently has ruled that when Congress enacts an express preemption statute, the preemptive scope of the statute is governed, first and foremost, "by the express language" of the statute. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); see also *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (same).[22] At its core, the issue of preemption is a matter of statutory intent, and the Court accordingly begins with "'the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990)).

Nowhere in its decision below does the court mention, let alone analyze, the critical role played by the statutory language and legislative intent reflected in the express preemption provision of Section 332. Instead, the Washington Supreme Court's decision rests on its analysis whether the award of damages in this case presents an actual and direct conflict with a rate determined by the FCC to be reasonable such that a court would be required to "'substitute its judgment for the agency's on the reasonableness of a rate.'" App. 26a. In basing its

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[22] Although Congress' intent is primarily discerned from the language of the statute, courts must also look to the "'structure and purpose of the statute as a whole.'" *Medtronic*, 518 U.S. at 485.

analysis on this erroneous and cramped "conflict" standard, the Washington Supreme Court's decision is inconsistent with express preemption decisions from this Court,[23] and in direct conflict with subsequent decisions by lower state and federal courts. See *Simons* v. *GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. Apr. 11, 1996) (App. 62a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68-69a).

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[23] *See, e.g., American Airlines*, 513 U.S. at 227 (preempting state consumer protection act claims because of potential for "intrusive regulation" of business practices inherent in that type of legislation); *Cipollone*, 505 U.S. at 523-24 (preempting failure-to-warn claims under state law based on statute that prohibited "requirement or prohibition imposed under State law").

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 9, 1998

APPENDICES

APPENDIX A

CORYELLE TENORE, CHARLES F. PETERSON AND KAREN M. COLE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Appellants v. AT&T WIRELESS SERVICES AND MCCAW CELLULAR COMMUNICATIONS, INC. D/B/A CELLULAR ONE, Respondents.

Number 65609-6

SUPREME COURT OF WASHINGTON,

En Banc.

Argued May 19, 1998.

Decided Sept. 10, 1998.

Steve Berman, Erin K. Flory, Seattle, for Appellants.

Stokes, Eitelbach & Lawrence, Michael Kipling, Laura J. Buckland, Kelly Noonan, Seattle, for Respondents.

SMITH, Justice.

Appellants Coryelle Tenore, Charles F. Peterson and Karen M. Cole, on behalf of themselves and all others similarly situated, seek direct review of a judgment of the King County Superior Court which dismissed their class action lawsuit on a Civil Rule (CR) 12(b)(6) motion based upon federal preemption of state law claims under 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of primary jurisdiction. We granted review. We reverse the trial court.

QUESTION PRESENTED

The question presented is whether the trial court was correct in dismissing Appellants' state law claims on a CR 12(b)(6) motion based upon federal preemption under 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of primary jurisdiction.

STATEMENT OF FACTS

On October 24, 1995, Appellants Coryelle Tenore, Charles F. Peterson and Karen M. Cole, individually and on behalf of others similarly situated, filed in the King County Superior Court a class action complaint against Respondents AT&T Wireless Services and McCaw Cellular Communications, Inc. d/b/a Cellular One.[1] Respondent AT&T Wireless Services (AT&T) is a wholly owned subsidiary of AT&T Corporation and provides cellular service in the Northwest region.[2] McCaw Cellular Communications, Inc. d/b/a Cellular One (McCaw Cellular), also named as a defendant, was the largest provider of cellular telephone service in the country until it merged with AT&T.[3] McCaw Cellular no longer exists as a separate entity.[4]

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[1] Br. of Appellants at 3.

[2] Clerk's Papers at 7, 155, 158. Respondents note that AT&T Wireless itself does not hold any cellular licenses, but instead provides cellular telephone service through direct and indirect ownership interests in cellular license holders.

[3] *Id.* at 158. As of 1996, cellular service was in existence for over 13 years, growing at the rate of 50 percent per year. John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 Fed. Comm. L.J. 247, 256 (1996).

[4] Respondents AT&T and McCaw Cellular, are collectively referred to in this opinion as "AT&T."

In their Second Amended Class Action Complaint, Appellants claimed that Respondent AT&T engaged in "deceptive, fraudulent, misleading and/or unfair conduct" by not disclosing its practice of "rounding" airtime in order to "induce cellular customers to use its cellular service, and/or in order to unfairly profit."[5] "Rounding," "rounding up" or "full minute billing" is a common billing practice in the cellular and long distance telephone industry where fractions of a minute are rounded up to the next highest minute.[6] For example, a call that lasts one minute and one second is charged as a two-minute call, but the subscriber is not informed of the actual duration of the call.[7] Appellants claim this billing practice "results in millions of dollars of excess billing . . . all at the expense of the unwary customer."[8] Appellants additionally claim this practice is "contrary to the 'Service Agreement' . . . which states that the customer is billed only for 'the time you press send until the time you press end.'"[9]

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[5] Clerk's Papers at 156.

[6] *Id.* at 8. Long distance carriers have historically used full minute billing. In a similar class action full minute billing case, the United States Court of Appeals for the District of Columbia recently affirmed dismissal of fraud, negligent misrepresentation, and false advertising claims, holding that no reasonable customer of the long distance telephone service provider could actually have been misled by the standard and traditional practice of billing in whole minute increments. *Alicke v. MCI Comm's. Corp.*, 324 U.S. App. D.C. 150, 111 F.3d 909, 912 (D.C. Cir. 1997).

[7] Clerk's Papers at 156.

[8] *Id.*

[9] *Id.*

Also, Appellants claim cellular customers do not receive the full minutes they have contracted for at a fixed rate under their service plan because of rounding.[10] For example, all subscribers are required to choose between plans that offer varying specified minutes of airtime, such as 30, 60, or 100 minutes, for a fixed monthly rate, beyond which calls are billed at a specified per-minute rate.[11] But a 30-minute plan may not in fact provide 30 full minutes because of rounding. This is what Appellants claim AT&T should have disclosed.[12]

Appellants filed state law claims in the King County Superior Court for breach of contract,[13] negligent misrepresentation, fraud, and violation of the Washington Consumer Protection Act (CPA) under RCW Chapter 19.86.[14] They requested, among other things, injunctive relief and compensatory damages in the form of a refund of the difference between the amount charged by AT&T and the amount class members would have incurred if AT&T had not engaged in the practice of rounding up without disclosing it.[15] On April 29, 1997, AT&T moved for dismissal of the complaint by a CR 12(b)(6) motion based upon federal preemption of state law claims under 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Appellants no longer dispute the breach of contract claim on appeal. Br. of Appellants at 1.

[14] Clerk's Papers at 164-65

[15] *Id.* at 156-57, 166-67.

primary jurisdiction.[16] 47 U.S.C. sec. 332(c)(3)(A) provides in relevant part:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and condition of commercial mobile services.

AT&T contends this statute preempts Appellants' state law claims because the monetary relief sought by Appellants would necessarily require a court to engage in rate regulation in determining the refund award for partial minutes of cellular service.[17] AT&T further claims, under the doctrine of primary jurisdiction, that any challenge to the reasonableness of cellular rates must be deferred to the agency with expertise in rate regulation in this case, the Federal Communications Commissions (FCC).[18]

While AT&T's motion to dismiss was pending, the Court of Appeals, Division I, filed its decision in *Hardy v. Claircom Comm's. Group, Inc.*,[19] a case with a similar fact pattern to this one. The King County Superior Court, the Honorable J. Kathleen Learned, agreed with AT&T that *Hardy* is controlling and granted its motion to dismiss on June 13, 1997, stating:

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[16] *Id.* at 26.

[17] *Id.* at 9.

[18] *Id.* at 23.

[19] 86 Wash. App. 488, 937 P.2d 1128 (1997).

> The Court concludes as a matter of law that this case is controlled by Hardy v. Claircom and therefore the plaintiffs' state law claims are preempted by 47 U.S.C. sec. 332(c)(3)(A), and/or that the doctrine of primary jurisdiction requires that plaintiffs' claims be referred to the FCC.[20]

Appellants, however, contend they are only challenging the allegedly misleading advertising practices of AT&T and not the underlying rates or charges.[21] They argue it is within the authority of state courts to resolve their state law claims without FCC intervention.[22] After the order of dismissal, Appellants sought direct review by this Court, which we granted on January 6, 1998.

DISCUSSION

Standard of Review

Under CR 12(b)(6), a complaint can be dismissed for "failure . . . to state a claim upon which relief can be granted." A dismissal under this rule involves a question of law which is reviewed de novo by an appellate court and is appropriate only if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.[23] In such a case, a plaintiff's allegations are presumed to be true and a court may

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[20] Order of Dismissal. Clerk's Papers at 279.

[21] Br. of Appellants at 6.

[22] *Id.* at 29-30.

[23] *Hoffer v. State*, 110 Wash. 2d 415, 420, 755 P.2d 781 (1988), *aff'd*, 113 Wash. 2d 148, 776 P.2d 963 (1989); *Bravo v. Dolsen Cos.*, 125 Wash. 2d 745, 750, 888 P.2d 147 (1995).

consider hypothetical facts not included in the record.[24] CR 12(b)(6) motions should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."[25]

Hardy v. Claircom Communications Group, Inc.

In dismissing Appellants' complaint, the trial court concluded as a matter of law that it was bound by the decision of the Court of Appeals, Division I, in *Hardy v. Claircom Comm's. Group, Inc.*,[26] the only Washington case addressing the specific issues now before this Court.[27] Appellants argue that *Hardy* should not control the decision in this case and that the two cases are distinguishable.[28] AT&T claims *Hardy* is on point and urges this Court to follow it.[29]

The facts in *Hardy* are somewhat similar to the facts in this case. In *Hardy*, Appellants Michael J. Hardy and Michael Lair brought class action lawsuits in the King County Superior Court against Claircom Communications Group, Inc., d/b/a AT&T

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[24] *Cutler v. Phillips Petroleum Co.*, 124 Wash. 2d 749, 755, 881 P.2d 216 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873 (1995).

[25] *Hoffer*, 110 Wash. 2d at 420 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure 1357, at 604 (1969)); *Orwick v. City of Seattle*, 103 Wash. 2d 249, 254, 692 P.2d 793 (1984).

[26] 86 Wash. App. 488, 937 P.2d 1128 (1997).

[27] Order of Dismissal. Clerk's Papers at 279.

[28] Br. of Appellants at 23.

[29] Br. of Resp'ts at 6-7.

Wireless Services (Claircom) and GTE Airphone, Inc. (GTE) claiming breach of contract, negligent misrepresentation, fraud and violation of the Washington Consumer Protection Act.[30] Claircom and GTE provide air-to-ground radiotelephone services for passengers on commercial aircraft.[31] Appellants claimed the companies were liable because the promotional materials provided to passengers aboard aircraft did not disclose the companies' practice of rounding up airtime.[32] The trial courts dismissed both appellants' actions ruling their claims were preempted by 47 U.S.C. sec. 332(c)(3)(A) and barred by the filed tariff doctrine.[33] The Court of Appeals affirmed on the same grounds.[34]

Filed Rate or Filed Tariff Doctrine[35]

The "filed rate" doctrine, also known as the "filed tariff"[36] doctrine, is a court-created rule to bar suits against regulated utilities involving allegations concerning the reasonableness of

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[30] *Hardy*, 86 Wash. App. at 489-91.

[31] *Id.* at 490.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112 (S.D.N.Y. 1992) *aff'd*, 27 F.3d (2d Cir. 1994) for a comprehensive history of the doctrine.

[36] "Tariff" is defined as "Schedules of rates and regulations filed by common carriers." 47 C.F.R. 61.3(ii) (1997). Courts commonly use "filed rate" to refer to a tariff.

the filed rates.[37] This doctrine provides, in essence, that any "filed rate" a rate filed with and approved by the governing regulatory agency is per se reasonable and cannot be the subject of legal action against the private entity that filed it.[38] The purposes of the "filed rate" doctrine are twofold: (1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency.[39] These principles serve to provide safeguards against price discrimination and are essential in stabilizing prices.[40] But this doctrine, which operates under the assumption that the public is conclusively presumed to have knowledge of the filed rates, has often been invoked rigidly, even to bar claims arising from fraud or misrepresentation.[41]

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[37] *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994).

[38] *Id.*

[39] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 (1981).

[40] *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126, 110 S. Ct. 2759, 2766, 111 L. Ed. 2d 94 (1990).

[41] *Kansas City S. R. Co. v. Carl*, 227 U.S. 639, 653, 33 S. Ct. 391, 395, 57 L. Ed. 683 (1913) ("Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper"); *See also Marco Supply Co. v. AT&T Comm's., Inc.*, 875 F.2d 434 (4th Cir. 1989) (doctrine precludes claim of price misrepresentation); *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992) (en banc) (allegedly overcharged or defrauded customers suffered no cognizable injury because of filed rate); *Southwestern Bell Tel. Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687 (Tex. App. 1996) (doctrine bars action for various allegedly anticompetitive practices committed by long distance provider).

Courts have construed the "filed rate" doctrine broadly in dismissing lawsuits against telecommunications carriers involving direct or indirect challenges to the reasonableness of rates. In *Marcus v. AT&T Corp.*, subscribers to AT&T Corporation's long distance telephone service brought class action lawsuits in the United States District Court claiming fraud, deceptive acts and practices, false advertising, negligent misrepresentation, and other state law actions for the company's alleged practice of rounding up call charges without adequate disclosure.[42] In addition to other forms of relief, plaintiffs sought compensatory damages from the defendant.[43] AT&T claimed the "filed rate" doctrine barred their claims, but plaintiffs asserted their claims did not implicate the doctrine because they merely challenged AT&T's alleged nondisclosure and deceptive advertising practices, and not the reasonableness of the underlying rates.[44] The court dismissed plaintiffs' state claims for damages in its entirety based upon the "filed rate" doctrine, stating that calculation of the damages plaintiffs sought would necessarily require the court to determine a reasonable rate in direct contravention of the "filed rate" doctrine.[45] The United States Court of Appeals for the Second

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[42] 938 F. Supp. 1158, 1164 (S.D.N.Y. 1996).

[43] *Id.*

[44] *Id.* at 1170.

[45] *Id.* at 1172.

Circuit affirmed the decision on appeal.[46] Other courts have dismissed similar actions under the "filed rate" doctrine.[47]

Respondent AT&T cites the *Marcus* case and related decisions in support of its federal preemption argument.[48] This contention, however, is without merit, simply because this case does not implicate the "filed rate" doctrine. Under Section 203 of the Federal Communications Act of 1934 (FCA), all telecommunications common carriers are required to file tariffs with the FCC.[49] Most telecommunications carriers, including long distance telephone service providers, come within the meaning of "common carrier," which is broadly defined as "any person engaged in rendering communication service for hire to

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[46] *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998).

[47] *See Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994); *Cahnmann v. Sprint Corp.*, 961 F. Supp. 1229 (N.D. Ill. 1997) *aff'd*, 133 F.3d 484 (1998); *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 660 N.Y.S.2d 440 (1997).

[48] Respondent called the Court's attention to a recent United States Supreme Court decision, *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, U.S., 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998), which reversed a ruling of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit had affirmed a magistrate judge's award of damages on state law claims despite the existence of a filed tariff, stating "because this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed rate doctrine does not apply." *Central Office Tel., Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 990 (9th Cir. 1997). In reversing the Ninth Circuit, the Supreme Court reasoned that "rates do not exist in isolation . . . [but] have meaning only when one knows the services to which they are attached." Accordingly, the Court ruled the fact services and billing are involved instead of rates or ratesetting does not make the filed rate doctrine inapplicable. *American Tel. & Tel. Co.*, 118 S. Ct. at 1963.

[49] 47 U.S.C. 203(a).

the public."[50] Thus, as required under Section 203(a) of the FCA, the defendants AT&T, NYNEX, and Sprint in *Marcus*, *Wegoland*, *Cahnmann* and *Porr* each had tariffs on file with the FCC.

In this case, Respondents AT&T Wireless Services and McCaw Cellular Communications, Inc. d/b/a Cellular One, are cellular telephone service providers, broadly characterized as commercial mobile radio service providers, and are specifically exempted from tariff filing requirements by the FCC.[51] Because there is no tariff filing requirement, the reasonableness of rates charged by commercial mobile radio service (CMRS) providers is not determined by the FCC.[52] Accordingly, not only are there

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[50] 47 C.F.R. 101.3 (1997).

[51] Section 332 of the FCA which governs "mobile services" construes cellular telephone service providers as common carriers, and thus companies providing cellular services are subject to many of the same regulations as long distance telephone service providers. 47 U.S.C. 332(c)(1)(A). For example, cellular telephone service providers must furnish service to all customers upon reasonable request and may not charge rates or engage in practices that are unjust or unreasonable. 47 U.S.C. 201, 202. However, cellular telephone service providers and other similar mobile entities, commonly referred to as "Commercial Mobile Radio Service" (CMRS) providers, are specifically exempted from complying with Section 203 (section requiring tariff filing). 47 C.F.R. 20.15(a), (c) (1997); *see* 47 C.F.R. 20.3 (1997) for a definition of CMRS and 20.9(a), for a listing of the 13 mobile services currently considered by the FCC to be CMRS. Also, in an exhaustive FCC order implementing various provisions of the FCA's 1993 amendments, the FCC concluded that sufficient competition in the cellular marketplace obviates any need for conventional regulation and decided to "forbear from imposing any tariff filing obligations upon CMRS providers." Second Report and Order, In the Matter of Implementing of Sections 3(n) and 332 of the *Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1418 and 1478 (1994).

[52] 47 C.F.R. 20.15(a), (c).

no tariffs on file, but the two purposes behind the "filed rate" doctrine preserving an agency's primary jurisdiction to determine the reasonableness of rates and insuring that only those rates approved are charged do not apply in this case.[53] The authorities relied upon by Respondent AT&T are thus not applicable.

In addition, AT&T claims the recent Court of Appeals, Division I, case, *Hardy v. Claircom Comm's. Group, Inc.*, is controlling, although AT&T rests its argument on preemption and concedes the "filed rate" doctrine is not directly applicable.[54] In *Hardy*, both defendants Claircom and GTE had tariffs on file with the FCC, and accordingly, to the extent dismissal was predicated upon the "filed rate" doctrine, the court's decision was correct.[55] However, there was a period of five months during which Claircom's tariff was not filed, and the court correctly used preemption analysis to resolve the case during that brief period.[56]

Federal Preemption

Recognizing the rapid growth of the cellular telecommunications industry, Congress in 1993 amended the FCA, 47 U.S.C. §§ 151-229 to provide a comprehensive and uniform federal regulatory framework for all commercial mobile

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[53] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 (1981).

[54] Br. of Resp'ts at 16-17.

[55] *Hardy*, 86 Wash. App. at 493. Air-to-ground radio mobile service providers are subject to greater regulatory control than other CMRS providers, and thus are required to file tariffs with the FCC.

[56] 86 Wash. App. at 495-96.

radio service (CMRS) providers.[57] To accomplish its objective of regulatory uniformity and deregulation of CMRS, Congress amended Section 332 of the FCA to provide:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. According to the FCC, implementing preemption rules will serve an important purpose: to "help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede the federal mandate for regulatory parity."[58] AT&T asserts 47 U.S.C. sec. 332(c)(3)(A) preempts all of Appellants' state law claims.

The doctrine of preemption originates from the Supremacy Clause in Article VI of the United States Constitution, which generally results in declaring invalid state laws that are contrary to or interfere with the laws of Congress.[59] The principal inquiry in preemption analysis is Congress' objective or purpose in enacting a law.[60] The intent of Congress may be expressly

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[57] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 6002, 107 Stat. 312, 387-97 (1993).

[58] *Second Report and Order*, 9 FCC Rcd at 1421.

[59] U.S. Const. art. VI, cl. 2; *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604, 111 S. Ct. 2476, 2481, 115 L. Ed. 2d 532 (1991).

[60] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992).

stated in a statute or implicitly contained in its structure and design.[61] If Congress enacts a provision defining the preemptive reach of a statute, matters beyond that expressed scope are not preempted.[62]

Appellants argue the express language of Section 332 itself, which defines the FCA's preemptive reach, allows states to regulate "the other terms and conditions of commercial mobile service" that do not relate to market entry or rate regulation.[63] They assert these "other terms and conditions" include a carrier's "advertising, marketing and contracting, which are distinct from the federally regulated issues of rates and entry."[64] A Congressional House Report on the Omnibus Budget Reconciliation Act of 1993 tends to support Appellants' contention:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protections matters . . .[65]

At least one United States District Court that addressed the "terms and conditions" clause of Section 332 concluded the

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[61] *Id.*

[62] *Id.* at 517.

[63] Br. of Appellants at 6. *See* 47 U.S.C. 332(c)(3)(A).

[64] Br. of Appellants at 10.

[65] H.R. REP. No. 103-111, 103rd Congress, 1st Sess. 211, 261, reprinted in 1993 U.S.C.A.A.N. 378, 588.

clause "permits state regulation of cellular telephone service providers in all areas other than the providers' entry into the market and the rates charged to their customers."[66]

Appellants additionally claim the "savings clause" in Section 414 of the FCA indicates Congressional intent to preserve state law actions that do not challenge market entry or rates charged to subscribers.[67] 47 U.S.C. sec. 414 provides:

> Nothing in the chapter . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Some courts have cited this provision in ruling against preemption of state law claims for charges involving billing or advertising practices.[68] As Respondent AT&T contends, these cases, although factually similar, are not directly on point because they involve the question whether cases should be removed from state courts to federal courts and remain in those courts under the complete preemption doctrine.[69]

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[66] *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 552 (D.N.J. 1996); *see also Mountain Solutions, Inc. v. State Corp. Comm'n*, 966 F. Supp. 1043, 1048 (D. Kan. 1997).

[67] Br. of Appellants at 7. *See* 47 U.S.C. 414.

[68] *Bennett v. Alltel Mobile Communications of Alabama, Inc.*, No. 96-D-232- N, slip op. at 11 (M.D. Ala. 1996); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431, 439 (D.N.J. 1996); *Sanderson v. AWACS, Inc.*, 958 F. Supp. 947, 956-58 (D. Del. 1997); *DeCastro*, 935 F. Supp. at 551.

[69] Br. of Resp'ts at 22-27. "Complete preemption" is a related but different procedural doctrine than ordinary preemption and is invoked to determine whether a state law claim should be moved to federal court or whether the claims in federal court should be remanded to state court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 1546, 95 L. Ed. 2d 55

The courts in *Bennett, Sanderson and DeCastro*, applying 47 U.S.C. sec. 332(c)(3)(A), each ruled against complete preemption of plaintiffs' state law claims and remanded the cases to state courts.[70] Thus, the savings clause in Section 414, together with the "terms and conditions" clause in Section 332, defeats preemption in favor of preserving state law claims that do not attack or regulate market entry or rates.[71]

The gravamen of Respondent AT&T's argument, however, is that Appellants' request for monetary damages requires a court to retroactively establish new rates in determining damages, which, in effect, is state rate-making explicitly preempted by 47 U.S.C. sec. 332(c)(3)(A) of the FCA.[72] Appellants assert they only challenge AT&T's inadequate disclosure practices in connection with billing, and do not

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(1987). This doctrine provides that, in limited situations, ordinary common law complaints can be converted into federal claims when the preemptive force of a federal statute is sweeping and extraordinary. *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809, 814-15 (N.D. Cal. 1991). The United States Supreme Court has stressed the limited scope of this doctrine, finding complete preemption in only two instances: under 301 of the Labor Management Relations Act and under 502(a) of the Employee Retirement Income Security Act of 1974. *DeCastro*, 935 F. Supp. at 549.

[70] *Bennett*, No. 96-D-232-N at 14; *Sanderson*, 958 F. Supp. at 956-58; *DeCastro*, 935 F. Supp. at 554-55.

[71] Congress could have, if it desired, completely preempted state law by stating that 332(c)(3)(A) would preempt all state laws that related to the rates charged, instead of providing for preemption only where state law regulates "the entry of or the rates charged" by CMRS providers. Compare ERISA's broader preemption clause which states that the law "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .." 29 U.S.C. 1144(a).

[72] Br. of Resp'ts at 6.

contest the reasonableness or legality of the underlying rates.[73] AT&T counters by stressing that Appellants' claim is essentially a disguised form of attack on the reasonableness of its rates.

As authority for its contention, Respondent AT&T first cites three class action rounding cases that were dismissed by various courts.[74] Those cases, however, do not significantly support AT&T's position. *Rogers*, an Indiana Superior Court case, is a cursory order devoid of facts or legal analysis.[75] In *Simons*, a case before the United States District Court for the Southern District of Texas, Respondent AT&T itself stated in its brief that the plaintiffs "challenged the reasonableness of early termination fees," which made it proper for the court to dismiss on preemption grounds.[76] And in *Powers*, a San Diego County Superior Court case, the plaintiffs claimed in their complaint that they were damaged by defendant's "methods of determining or calculating the quantity of chargeable airtime

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[73] Br. of Appellants at 5.

[74] *Rogers v. Westel-Indianapolis Co.*, No. 49D03-9602-CP-0295 (Ind. Super. Ct. July 1, 1996) (superior court dismissed class action concluding it did not have jurisdiction because the remedy requested by plaintiffs would require a change of rates and should therefore be heard by the FCC or a federal court); *Simons v. GTE Mobilnet*, No. H-95-5169 (S.D. Tex. April 11, 1996) (court dismissed case as preempted by the FCA where plaintiffs challenged the reasonableness of early termination fees in cellular service contracts); *Powers v. Airtouch Cellular*, No. N71816 (San Diego County. Super. Ct. Cal. Oct. 6, 1997) (case dismissed because although plaintiffs alleged suit was based on defendant's alleged failure to disclose "teardown charges," the real focus was on the legality or reasonableness of those charges.)

[75] *Rogers*, at 1-2.

[76] Br. of Resp'ts at 19.

usage," which, as the court found, seemed more like an attack on rates than a challenge to inadequate disclosure.[77]

In this case, Appellants do not contend they were injured by AT&T's practice of rounding its airtime. Instead, they only claim they were damaged by AT&T's inadequate disclosure concerning that practice. They assert this type of claim, which alleges fraud or deceptive advertising and not the reasonableness of rates, should not be preempted. They cite several cases in support of their position.[78]

Appellants also cite *Kellerman v. MCI Telecomm's. Corp.*[79] In that case, plaintiffs, seeking damages, brought a class action against their long distance telephone service provider for breach of Illinois' consumer fraud and deceptive trade practices acts, claiming that certain of defendant's advertisements and promotional materials were fraudulent and deceptive.[80] The Illinois Supreme Court held the state law claims were not

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[77] *Powers*, at 1.

[78] *In re Long Distance Telecomm's. Litig.*, 831 F.2d 627 (6th Cir. 1987) (in plaintiff's fraud claims arising from defendant's alleged failure to disclose its practice of charging long distance customers for uncompleted calls, ring time and holding time, court held the state law claims were not preempted because they did not conflict with the FCA and were within the conventional experience of the courts); *Bruss Co. v. Allnet Communication Servs., Inc.*, 606 F. Supp. 401 (N.D. Ill. 1985) (court denied motion to dismiss claims for fraud and unfair trade practices involving alleged overcharges for phone services); *American Inmate Phone Sys., Inc. v. US Sprint Comm's. Co.*, 787 F. Supp. 852 (N.D. Ill. 1992); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431 (D.N.J. 1996).

[79] 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24, *cert. denied*, 479 U.S. 949, 107 S. Ct. 434, 93 L. Ed. 2d 384 (1986).

[80] *Kellerman*, 493 N.E.2d at 1047-48.

preempted, relying on the FCA's savings clause, Section 414, concluding:

> The subject matter of plaintiffs' complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements concerning the cost of its long distance telephone service.[81]

Appellants additionally cite *DeCastro v. AWACS, Inc.*[82] In that case, plaintiffs brought a class action against defendant, a cellular telephone service provider, making various state law claims relating to defendant's inadequate disclosure concerning certain billing practices.[83] The case was removed to federal court on defendant's motion, but the court remanded, ruling that the FCA does not provide an enforcement mechanism for claims involving failure to disclose billing practices, stating:

> These two claims center around Comcast's alleged failure to disclose a particular billing practice; they do not challenge the billing practice as unreasonable or contrary to law, nor does their resolution require a court to assess the reasonableness of the defendant's billing practice.[84]

Kellerman and *DeCastro* both conclude that the FCA does not displace, but instead supplements, state law claims against service providers for misrepresentation, fraud and unfair billing

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[81] *Id.* at 1051.

[82] 935 F. Supp. 541 (D.N.J. 1996).

[83] *Id.* at 545.

[84] *Id.* at 550.

practices.[85] The FCC itself has stated that the savings clause, Section 414:

> Preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation remedies generally applicable to all corporations operating in the state, not just telecommunications carriers.[86]

AT&T challenges those cases as not constituting direct authority for the issue now before this Court. AT&T correctly notes that many of those cases were decided before Congress amended Section 332, and do not therefore refer to that provision; and that other cases involve the "complete preemption" doctrine, a related but different analysis than preemption under the explicit language of Section 332. Those cases nevertheless offer some support for Appellants' assertion that their state claims are not preempted.

Respondent AT&T also cites cases which offer support for its position, but those cases are not directly on point. Respondent cites authorities which stand for the proposition that damage awards are tantamount to rate regulation.[87] But in

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[85] *Kellerman*, 493 N.E.2d at 1051; DeCastro, at 554.

[86] *In re Operator Servs. Providers of Am.*, 6 FCC Rcd 4475, 4477 (1991); *see also In the Matter of Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 10 FCC Rcd 13639, 13641 (1995) (section 414 preserves claims against carriers as against other corporations, such as liability for misleading advertising).

[87] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79, 101 S. Ct. 2925, 2931, 69 L. Ed. 2d 856 (1981) (damage actions are disguised retroactive rate adjustments and thus barred by filed rate doctrine); *Chicago and N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323, 101 S.

each of those cases, either the harsh rule of the "filed rate" doctrine was implicated or the claims were found to be completely preempted by the regulatory agency's exclusive and plenary authority.

In *Hardy v. Claircom Communications Group, Inc.*, the Court of Appeals, Division I, properly relied upon the "filed rate" doctrine to dismiss all of plaintiffs' claims arising under it.[88] However, for the five-month period during which there was no tariff on file, the court held that Section 332 preempted it, stating, "Hardy's claims implicate not only the advertising practices of AT&T Wireless but also the reasonableness of the carrier charging the tariff rate in light of those practices."[89] The court concluded the claims are preempted because Hardy is challenging the reasonableness of the tariff "in light of those practices."[90] But there was no tariff filed for the five-month period.[91] And the court used Section 332 preemption analysis

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Ct. 1124, 1133, 67 L. Ed. 2d 258 (1981) (state court action dismissed where Interstate Commerce Commission's authority under the Interstate Commerce Act to regulate abandonments is exclusive and plenary); *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1121 (S.D.N.Y. 1992) (damages award would require a court to determine a reasonable rate); *Weinberg v. Sprint Corp.*, No. BER-L-12073-95 (N.J. Sup. Ct. 1996) (a court's calculation of prorated rate for calls consisting of less than one minute amounts to a statement that phone companies should charge subscribers by the second in direct conflict with FCC determinations that rounding up is legitimate).

[88] 86 Wash. App. 488, 495, 937 P.2d 1128 (1997).

[89] *Id.* at 495.

[90] *Id.* at 496.

[91] *Id.* at 495.

solely to address the "5-month period during which AT&T Wireless concededly had no filed tariff in place."[92]

Respondent now argues that cases have held that damages implicate rate adjustment and are tantamount to rate regulation; and even though those cases involved the "filed rate" doctrine, that reasoning should be extended to dismiss claims requesting damages because, although there is no "filed tariff," the language of 47 U.S.C. sec. 332(c)(3)(A) preempts rate regulation.

The position of Appellants, though, is bolstered by *Nader v. Allegheny Airlines, Inc.*[93] In that case the plaintiff was denied boarding or "bumped" from his reserved and confirmed seat on Allegheny Airlines because the airline had overbooked its flights.[94] Instead of accepting "denied boarding compensation," plaintiff brought a common law action in the United States District Court for the District of Columbia claiming fraudulent misrepresentation because defendant did not disclose its deliberate overbooking practices[95]. The plaintiff was not contesting the reasonableness of the overbooking practice itself, but only the nondisclosure of it. The District Court found for the plaintiff, but the United States Court of Appeals for the District of Columbia reversed, ruling that the matter must be referred to the Civil Aeronautics Board (CAB) to determine whether defendant's alleged failure to disclose its deliberate

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92 *Id.*

93 426 U.S. 290, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976).

94 *Nader*, 426 U.S. at 292-94.

95 *Id.* at 294-95.

overbooking practice is deceptive.[96] The Court reversed mainly on primary jurisdiction grounds, but did address an issue relevant to this case.

The Supreme Court in *Nader* noted that the Court of Appeals relied on *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.* for its conclusion.[97] Abilene is a "filed rate" doctrine case which dismissed a state law action that challenged a published carrier rate as "unjust and unreasonable" by reasoning that an action for damages attacking the reasonableness of federally regulated rates would undermine the purpose of the Interstate Commerce Act.[98] The Court in *Nader* distinguished *Abilene* on the grounds that in *Nader* there was no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies."[99] In *Abilene*, the carrier would be put in an "untenable position" because it "could not abide by the rate filed with the Commission, as required by statute, and also comply with a court's determination that the rate was excessive."[100] The Court in *Nader* noted that in such a case, "the conflict between the court's common-law authority and the agency's ratemaking power was direct and unambiguous." [101] The Court then stated that in the case before it, the Court "in contrast, is not called upon to substitute its judgment for the agency's on

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[96] *Id.* 295-97.

[97] *Texas & Pac. R. Co. v Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907). *Nader*, 426 U.S. at 298.

[98] *Nader*, at 298-99 (discussing *Abilene*).

[99] *Id.* at 299.

[100] *Id.*

[101] *Id.*

the reasonableness of a rate."[102] That was because there was no tariff provision requirement that airlines engage in or disclose the practice of overbooking.[103] The Court concluded any "impact on rates that may result from the imposition of tort liability . . . would be merely incidental." [104] Thus, the Supreme Court reversed, holding that because the action "does not turn on a determination of the reasonableness of a challenged practice," but only on the issue of disclosure of that practice, "the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts."[105]

Similarly, in this case, the FCC does not require CMRS providers such as Respondent AT&T to file tariffs.[106] AT&T does not dispute that billing and advertising practices are not governed exclusively by the FCA, if at all. This is a question we need not consider. Appellants do not attack the reasonableness of AT&T's practice of rounding up call charges. They challenge only nondisclosure of the practice. *Nader* addresses the precise issue now before this Court. We consider it applicable authority.

There is sufficient reliable authority for this Court to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332 of the FCA. The award of damages is not per se rate regulation, and as the United States Supreme Court has

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[102] *Id.*

[103] *Id.* at 300.

[104] *Id.*

[105] *Id.* at 305.

[106] 47 C.F.R. 20.15(a), (c).

observed, does not require a court to "substitute its judgment for the agency's on the reasonableness of a rate."[107] Any court is competent to determine an award of damages.[108]

Primary Jurisdiction

In dismissing Appellants' complaint, the King County Superior Court concluded their state law claims were preempted by Section 332 of the FCA "and/or that the doctrine of primary jurisdiction requires that plaintiffs claims be referred to the FCC."[109]

"Primary jurisdiction" is a doctrine which requires that issues within an agency's special expertise be decided by the appropriate agency.[110] Under this doctrine claims must be referred to an agency if (1) the administrative agency has the authority to resolve the issues that would be referred to it by the court; (2) the agency has special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and (3) the claim before the court involves issues that fall within the scope of a pervasive

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[107] *Nader*, 426 U.S. at 299. *See also Bennett v. Alltel Mobile Comm's. of Ala., Inc.*, No. 96-D-232-N, slip op. at 6 (1996).

[108] The conclusion that Appellants' claims are not preempted by Section 332 is limited to that question and does not address the merits of the case.

[109] Order of Dismissal. Clerk's Papers at 279.

[110] *Vogt v. Seattle-First Nat'l Bank*, 117 Wash. 2d 541, 554, 817 P.2d 1364 (1991); *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126 (1956).

regulatory scheme creating a danger that judicial action would conflict with the regulatory scheme.[111]

Respondent AT&T asserts the doctrine of primary jurisdiction requires that this matter be decided by the FCC. The basis of AT&T's argument is no different than its contention concerning preemption Appellants' request for damages in effect requires a court to engage in rate regulation in determining a reasonable charge for partial minutes of airtime and thus it should be referred to the FCC which has special competence and expertise in rate regulation. AT&T cites several cases to support its position. We do not consider those cases persuasive.[112] Issues which call into question the legality or reasonableness of a carrier's rates should properly be referred to the FCC. In our discussion on preemption we have already concluded that Appellants' state law claims for nondisclosure did not constitute a challenge to the reasonableness of the rates, notwithstanding that they were requesting damages.

Appellants cite cases which hold that matters not pertaining to tariffs or rates do not require agency expertise, but fall within the conventional competence of courts without the need for

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[111] *In re Real Estate Brokerage Antitrust Litig.*, 95 Wash. 2d 297, 302-03, 622 P.2d 1185 (1980).

[112] *Smith v. Spring Comm's. Co.*, No. 96-2067 (N.D. Calif. 1996); *AT&T v. IMR Capital Corp.*, 888 F. Supp. 221, 224 (D. Mass. 1995); *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 660 N.Y.S.2d 440 (N.Y. App. Div. 1997). *See also Kaplan v. ITT-U.S. Transmission Sys., Inc.*, 589 F. Supp. 729 (E.D.N.Y. 1984), which supports AT&T's position. The plaintiff in that case brought suit claiming nondisclosure of charges for unanswered telephone calls. The United States District Court dismissed the case on primary jurisdiction grounds, stating that although "the plaintiff in this case is not challenging the reasonableness of a rate or tariff directly, he is challenging the reasonableness of a particular practice defendant's nondisclosure policy . . .." *Kaplan*, 589 F. Supp. at 732-33.

referral to the FCC.[113] In *Nader* v. *Allegheny Airlines, Inc.*, plaintiff brought common law actions against defendant Allegheny Airlines over nondisclosure of its overbooking practices. The Supreme Court held the doctrine of "primary jurisdiction" did not require the misrepresentation claim to be referred to the regulatory agency, the Civil Aeronautics Board (CAB).[114] The Court stated:

The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.[115]

Similarly, in this case there is no conflict between the authority of the FCC and that of a court in deciding whether AT&T's advertising practices are misleading. As in *Nader*, Appellants in this case do not challenge the reasonableness of AT&T's underlying practice of rounding its call charges. Also,

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[113] *National Comm's. Ass'n v. AT&T Co.*, 46 F.3d 220 (2d Cir. 1995); *Kellerman v. MCI Telecomm's. Corp.*, 134 Ill. App. 3d 71, 479 N.E.2d 1057, 89 Ill. Dec. 51 (1985), *aff'd*, 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24, *cert. denied*, 479 U.S. 949, 107 S. Ct. 434, 93 L. Ed. 2d 384 (1986); *Pace Membership Warehouse, Inc. v. US Sprint Comm's. Co.*, No. 90- F-2121, 1991 U.S. Dist. LEXIS 19788 (D. Colo. Feb. 8, 1991); *Source Assocs., Inc. v. MCI Telecomm's. Corp.*, 1989 WL 134580 (D. Kan. 1989); *Redding v. MCI Telecomm's. Corp.*, No. C-86-5498-CAL, 1987 U.S. Dist. LEXIS 16073 (N.D. Cal. Sept. 29, 1987).

[114] *Nader*, 426 U.S. at 292-95, 304-05.

[115] *Id.* at 305-06.

although the FCC enacted the preemption provision in Section 332 to promote uniformity, it did so primarily to prevent burdensome and unnecessary state regulatory practices, and not to subject the CMRS infrastructure to rigid control.[116] Nor does the FCC have exclusive authority over advertising and billing practices, if at all.

AT&T also argues FCC jurisdiction is appropriate because an award of damages would violate "47 U.S.C. sec. 202, which specifically prohibits price discrimination among customers."[117] In making this argument, however, AT&T overlooks the fact that the price discrimination must first be "unjust or unreasonable."[118] 47 U.S.C. sec. 202(a) states, in relevant part, "It shall be unlawful for any common carrier to make any *unjust or unreasonable* discrimination in charges, practices . . . or services for or in connection with like communication service . . . ." (Emphasis added.)

Section 202 has traditionally been used by companies in filing complaints with the FCC to allege discriminatory practices by carriers charging different rates for like services or used by the FCC in rejecting tariff filings that attempted to charge different prices for like services.[119] Courts have used a three-

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[116] *See Second Report and Order*, 9 FCC Rcd at 1413, 1418, 1478 (although there is congressional intent to create regulatory symmetry among CMRS, sufficient competition in the cellular marketplace obviates any need for conventional regulation and thus CMRS providers are exempt from tariff filing requirements).

[117] Br. of Resp'ts at 40-41.

[118] 47 U.S.C. 202(a).

[119] *American Broad. Cos. v. F.C.C.*, 213 U.S. App. D.C. 369, 663 F.2d 133 (D.C. Cir. 1980); *Ad Hoc Telecomm's. Users Comm. v. F.C.C.*, 220 U.S. App. D.C. 241, 680 F.2d 790 (D.C. Cir. 1982); *MCI Telecomm's. Corp. v.*

part test in determining whether a carrier is discriminating in violation of Section 202(a): (1) whether the services are "like"; (2) if so, whether there is a price difference between them; and (3) if there is such a difference, whether that difference is unreasonable.[120] The significant inquiry is whether two services are "like." In making this determination, courts use an FCC developed test known as the "functional equivalency test."[121] Under this test, the focus of the inquiry centers on whether the services in question are "different in any material functional respect."[122]

AT&T relies on two authorities for its argument, but both are "filed rate" doctrine cases and thus offer no significant support.[123] Accordingly, because Appellants do not challenge a practice requiring technical and expert evaluation by the FCC, and because Section 202 does not apply, we conclude the

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F.C.C., 286 U.S. App. D.C. 316, 917 F.2d 30 (D.C. Cir. 1990).

[120] *MCI Telecomm's. Corp.*, 917 F.2d at 39; *Competitive Telecomm's. Ass'n v. F.C.C.*, 302 U.S. App. D.C. 423, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *American Message Ctrs. v. FCC*, 311 U.S. App. D.C. 64, 50 F.3d 35, 40 (D.C. Cir. 1995).

[121] *American Broad. Cos.*, 663 F.2d at 138; *Ad Hoc Telecomm's. Users Comm.*, 680 F.2d at 795; *MCI Telecomm's. Corp.*, 917 F.2d at 39.

[122] *American Broad. Cos.*, 663 F.2d at 138 (quoting *American Trucking Ass'n v. F.C.C.*, 126 U.S. App. D.C. 236, 377 F.2d 121, 127 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943, 87 S. Ct. 973, 17 L. Ed. 2d 874 (1967)).

[123] *Gelb v. AT&T Co.*, 813 F. Supp. 1022, 1029-31 (S.D.N.Y. 1993), *aff'd*, 138 F.3d 46 (2d Cir. 1998; *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996); see also *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 74 Cal. Rptr. 2d 55 (1998) (injunctive relief is permissible but "filed rate" doctrine bars any monetary recovery).

matter need not be referred to the FCC under the doctrine of "primary jurisdiction."

SUMMARY AND CONCLUSIONS

The King County Superior Court dismissed Appellants' complaint concluding the case was controlled by *Hardy v. Claircom Comm's. Group, Inc.*, and preempted by 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of "primary jurisdiction." The ruling in Hardy principally involved the "filed rate" doctrine. AT&T cites "filed rate" doctrine cases in support of its position. In this case, however, AT&T as a commercial mobile radio service provider is specifically exempted from tariff filing requirements and thus those cases are not materially significant.

The language of Section 332 itself, contained in the "terms and conditions" clause, limits the preemptive reach of that provision. The savings clause, Section 414, is indicative of the intent of Congress to preserve state law claims for billing or advertising which do not attack market entry or rates charged by commercial mobile radio service (CMRS) providers.

The United States Supreme Court in *Nader v. Allegheny Airlines* concluded a challenge to a practice that is not governed by a tariff filing does not implicate the "conflict" inherent in contesting a practice or rate expressly regulated by an agency and that any impact on rates is "merely incidental." A court may award damages without it constituting rate making.

The doctrine of "primary jurisdiction" requires that a court refer issues within an agency's special expertise to the appropriate agency for an initial determination. Because Appellants' claims do not challenge the rates charged by AT&T nor any other technical practice requiring Federal Communications Commission (FCC) expertise, the matter falls

within the conventional competence of the courts without the need for referral to the FCC.

We reverse the judgment of the King County Superior Court which dismissed Appellants' class action complaint on a CR 12(b)(6) motion based upon federal preemption of state law claims under 47 U.S.C. sec. 332(c)(3)(A), the doctrine of "primary jurisdiction" and the Court of Appeals decision in *Hardy v. Claircom Communications, Inc.*

DURHAM, C.J., and DOLLIVER, GUY, JOHNSON, MADSEN, ALEXANDER, TALMEDGE and SANDERS, JJ., concur.

APPENDIX B

JUDGE J. KATHLEEN LEARNED

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated, Plaintiff, v. AT&T WIRELESS SERVICES and McCAW CELLULAR COMMUNICATIONS, INC. d/b/a CELLULAR ONE, Defendant.	NO. 95-2-27642-3SEA ORDER OF DISMISSAL

This matter was brought on for hearing by Defendants' Motion to Dismiss Based on Federal Preemption of State Law Claims and the Doctrine of Primary Jurisdiction ("Defendants' Motion"). This Court has considered the Defendants' Motion and Reply in Support of that Motion together with all supporting pleadings or exhibits; Plaintiffs' Opposition to Defendants' Motion to Dismiss; Declaration of Erin K. Flory in Opposition to Defendants' Motion to Dismiss; Appendix of Documents in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss; Plaintiffs' Workpapers in Opposition to Defendants' Motion to Dismiss; the pleadings and papers on file with the Court; and the oral argument presented by the parties.

The Court concludes as a matter of law that this case is controlled by *Hardy v. Claircom* and therefore that the plaintiffs' state law claims are preempted by 47 U.S.C. § 332(c)(3)(A); and/or that the doctrine of primary jurisdiction requires that plaintiffs' claims be referred to the Federal Communications Commission. NOW, THEREFORE:

IT IS HEREBY ORDERED, DECREED AND ADJUDGED that plaintiffs' Complaint is hereby dismissed with prejudice.

DATED this 13th day of June, 1998.

/s/
Hon. J. Kathleen Learned

Presented by:

STOKES, EITELBACH
& LAWRENCE, P.S.

By /s/
Michael E. Kipling (#07677)
Laura J. Buckland (#16141)
Kelly Twiss Noonan (#19096)
Attorneys for Defendants

APPENDIX C

JUDGE J. KATHLEEN LEARNED

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated, Plaintiffs, v. AT&T WIRELESS SERVICES and McCAW CELLULAR COMMUNICATIONS, INC. d/b/a CELLULAR ONE, Defendants.	NO. 95-2-27642-3SEA SECOND AMENDED CLASS ACTION COMPLAINT FOR BREACH OF CONTRACT, NEGLIGENT MISREPRESENTATION, COMMON LAW FRAUD, AND VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT

Plaintiffs, by their attorneys, for their complaint allege upon personal knowledge and belief as to their own acts and upon information and belief as to all other matters, based upon investigation of counsel, as follows.

I. NATURE OF ACTION

1. This is a class action brought on behalf of a class of subscribers to AT&T Wireless ("AT&T") cellular services in AT&T's Northwest region. This region encompasses, in addition to the state of Washington, the states of Idaho, Utah, Oregon and Alaska. Members of the proposed class also include

former cellular subscribers with McCaw Cellular Communications d/b/a Cellular One ("McCaw"), who are no longer customers of Cellular One or who are now being provided service by AT&T as a result of the merger of McCaw and AT&T.

2. In order to induce cellular customers to use its cellular service, and/or in order to unfairly profit, defendants engaged, and in the case of AT&T are still engaging, in deceptive, fraudulent, misleading and/or unfair conduct arising from their practice of charging for a full minute of airtime even if a subscriber is connected for just one second. For example, if a subscriber to defendants' cellular service places a phone call that lasts for a total of one minute and one second, the subscriber is billed for two minutes. This billing practice, known in the cellular industry as "rounding" or "full minute billing," results in millions of dollars of excess billing by AT&T and McCaw all at the expense of the unwary customer. The practice of "rounding" is contrary to the "Service Agreement" that AT&T and McCaw enters into with many of its subscribers, which states that the customer is billed only from "*the time you press send until the time you press end.*" The Service Agreement does not disclose or permit rounding.

3. Rounding also means that cellular consumers do not get the full minutes they have contracted for at a fixed rate under their applicable service plan. All subscribers must choose between plans that offer a specified number of minutes of airtime, *e.g.*, 30, 60, or 100 minutes, for a fixed monthly rate, beyond which calls are billed at a specified per-minute rate. Rounding results in subscribers not receiving the full airtime for which they paid under their basic plan. For example, in a 30-minute plan, due to rounding, a consumer might actually receive only twenty minutes or less of actual airtime. AT&T conceals this from consumers and is at this moment continuing to promulgate advertisements to the effect that a consumer receives "30 local

minutes of airtime every month" for subscribing to the $29.99 monthly plan, when in fact, due to rounding, consumers do not receive 30 minutes of airtime.

4. Plaintiffs seek, individually and on behalf of the Class, injunctive and monetary relief, including (a) an order enjoining defendant AT&T from charging consumers based on the practice of rounding up without disclosing the practice; and (b) compensatory damages in the form of a refund of the difference between the amounts charged by AT&T and/or McCaw and the amount, if any, which cellular users would have incurred if AT&T and McCaw did not engage in this practice.

5. The practices complained of herein are of a universal nature and equally affect all members of the plaintiff Class.

6. Plaintiffs do not seek to change, diminish, or modify the rates being charged by AT&T or formerly by McCaw pursuant to filings, if any, with any governmental regulatory agency. Plaintiffs do not seek any relief which would disturb the uniformity of rates charged by AT&T.

II. JURISDICTION AND VENUE

7. The claims asserted herein arise under common law and the Washington Consumer Protection Act.

8. This Court has jurisdiction over the parties because plaintiffs submit to the jurisdiction of the Court, and defendants are headquartered in King County, Washington, are licensed or authorized to do business in King County, Washington, and/or have, within the relevant time periods, transacted business in King County, Washington. This Court has jurisdiction over the subject matter of the suit because the events complained of occurred in King County, Washington.

9. Venue is proper in this Court, pursuant to RCW 4.12.025, because defendants transact or have transacted business in King

County, Washington and maintain offices in King County, Washington.

III. THE PARTIES

10. Plaintiff Coryelle Tenore signed a service agreement with Cellular One and now has her service provided by AT&T. Her service was activated on January 15, 1995, and is for a one-year period.

11. Plaintiff Charles F. Peterson executed a subscription agreement for AT&T cellular services on July 15, 1995.

12. Plaintiff Karen M. Cole executed a subscription agreement for AT&T cellular services on September 26, 1995.

13. Defendant McCaw Cellular Communications, Inc. d/b/a Cellular One, until its merger with AT&T, was the largest seller of cellular services in the United States. It operated throughout the country under the name Cellular One. McCaw is headquartered in Kirkland, Washington. On information and belief, final approval for the false and/or deceptive and misleading service agreements, brochures, and advertisements at issue in the case was given by officials at McCaw's headquarters in King County, Washington.

14. Defendant AT&T Wireless is a wholly owned subsidiary of telecommunications giant AT&T Corporation and has its headquarters in Kirkland, Washington. On information and belief, final approval for the false and/or deceptive and misleading service agreements, brochures, and advertisements at issue in the case was given by officials at AT&T's headquarters in King County, Washington.

IV. CLASS ACTION ALLEGATIONS

15. Plaintiffs bring this action pursuant to Rules of Procedure 23(b)(1), (2) and 23(b)(3) on behalf of the following class:

All current and former AT&T and Cellular One subscribers in the states of Washington, Idaho, Utah, Oregon, and Alaska who have been billed for cellular service by AT&T or Cellular One and have been subject to having their airtime charges rounded up to the next full minute, when their service agreement or contract provided that they would be billed from "send to end" or contained similar language indicating that they would be billed only for actual airtime. The Class includes subscribers who originally contracted with McCaw Cellular d/b/a Cellular One but who became subscribers of AT&T when the two companies merged, and subscribers of Cellular One who did not become subscribers of AT&T. Excluded from the Class are all subscribers who were or are employees or officers of AT&T and McCaw.

16. Plaintiffs seek injunctive, compensatory and declaratory relief on behalf of the Class.

17. There are many thousands of members of the Class. AT&T and McCaw has or had revenues in the hundreds of millions of dollars as a result of cellular services. The exact number of members of the Class is presently unknown to plaintiffs but may be determined from records maintained by McCaw and AT&T as both send monthly bills to members of the proposed Class.

18. Plaintiffs are members of the Class. Plaintiffs' claims are substantially identical to and typical of the claims of members of the proposed Class.

19. Plaintiffs and plaintiffs' counsel (who are experienced in class action litigation) will fairly and adequately protect the interests of the Class.

20. Questions of fact and law common to the Class include, *inter alia*:

a. whether defendants have engaged and are engaging in the unlawful, deceptive, fraudulent, and/or misleading conduct alleged herein;

b. whether such conduct violates uniform state consumer protection laws and constitutes misrepresentation, fraud, and breach of contract;

c. whether injunctive relief is appropriate and, if so, what form of injunctive relief is most appropriate; and

d. whether plaintiffs and the members of Class have suffered damages as a result of the conduct alleged herein, and if so, the measure of such damages.

21. Defendants have acted and are acting on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

22. The common questions of fact and law predominate over any individual questions.

23. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

24. There are no unusual difficulties likely to be encountered in the management of this litigation as a class action. A class action is the only feasible method by which this controversy may be resolved.

25. Notice to the Class may be accomplished cheaply, efficiently and in a manner best designed to protect the due process rights of all Class members by means of written notices supplied as part of McCaw and AT&T's billing procedures.

V. BACKGROUND FACTS

26. Cellular phone service involves a recent technology of mobile radio communication based on a computer-coordinated series of cell sites situated throughout the coverage area. Each

cell site contains a radio transmitter which services a portion of the total coverage area. When a call is placed, the system locates the telephone, establishes a connection through the appropriate cell site and transfers that connection to other cell sites as the telephone moves through the area served by the system.

27. The FCC allocated radio frequencies for cellular services in a manner that allowed for only two cellular systems per market.

28. AT&T is a wholly owned subsidiary of AT&T Corporation and is organized to provide wholesale cellular service in markets serviced by landline carriers affiliated with AT&T. AT&T operates cellular services in virtually all states. In the Puget Sound region it is known as AT&T Wireless, and it includes consumers who were subscribers of McCaw Cellular d/b/a Cellular One, which is now a part of AT&T. Formerly, McCaw operated in numerous geographic regions, including the state of Washington.

29. The limitation of two cellular licenses per market has, unfortunately for consumers, created an immensely profitable oligopoly. Armed with oligopoly, if not monopoly, power, the cellular companies charge steep prices for airtime and feel free to engage in practices, like the ones described herein, that are inherently unfair to consumers.

30. Due to its immense profitability, cellular companies, like McCaw and AT&T, engage in extensive advertising designed to lure in cellular consumers and to induce use of cellular airtime.

31. AT&T (and formerly McCaw) offers consumers a range of billing plans. These plans offer a fixed charge for a specified period of airtime for both personal plans and business plans, *e.g.*, 30, 60 or 90 minutes per month for personal and 500 or 2,000 minutes per month for business plans. For any airtime

beyond the fixed-charge time allotted for each plan, the subscriber is charged at specified rates "per minute."

32. AT&T requires that each customer sign a "Service Agreement," which identifies the package the subscriber selected and constitutes the contract between AT&T and the subscriber. These contracts typically obligate the subscriber for a one or two-year period. McCaw had the same practice.

33. AT&T has the capacity to bill, as it does for its landline services in some circumstances, to the nearest I/ 10 of a minute, or even to the nearest second of airtime. McCaw also had this capacity.

34. When calculating airtime under any service agreement AT&T rounds up, as did McCaw. For example, if a caller places a call that uses one minute and one second of actual airtime, that caller is billed for two minutes. AT&T always rounds up to the full minute.

35. This practice contradicts the express terms of the Service Agreement of plaintiffs and the other members of the Class, which typically provide:

> **Billing and Payment of Charges....** For answered calls, airtime charges are from the time you press send until the time you press end. [] [Emphasis added, bold in original.]

36. As a result of defendants' practice, plaintiffs and other members of the Class have been overcharged, in that they (1) have not received the fixed-rate airtime allocated under their plan; (2) are not billed down or back to a full minute, but are billed only up or forward to the next highest full minute; and (3) are overbilled for airtime beyond the fixed-rate airtime provided for in their service plan.

37. As a result of this deceptive practice, AT&T takes in millions of dollars in additional charges to which, it is not entitled, and consumers overpay. McCaw also took in millions of dollars in excess charges.

38. AT&T customer service representatives, when questioned about this practice, admit that "it is confusing."

39. In brochures and advertising materials, AT&T routinely represents that the consumer is allowed so many "minutes" of airtime at a fixed monthly charge under the appropriate service plan and is billed thereafter on a per minute basis. McCaw followed the same practice. In fact, because of defendants' practice of "rounding," consumers have received less than their monthly allotment of minutes at the fixed charge. In addition, after exhausting their monthly allotment, they have paid more for additional time than what they would have paid if they were billed only for the minutes of airtime they actually used.

40. For example, when Cellular One would provide information to a prospective subscriber, the subscriber would typically receive a document describing the "Features" of the service plans. A typical brochure contains the following language:

Premier	Frequent user: over 6 calls per day	Digital	Analog
Monthly access		$109.99	$139.99
Minutes included		360	360
Free Premier Club Membership			
ADDITIONAL AIRTIME			
Peak		361-720 30¢	38¢
Retroactive over 721 *		26¢	22¢
Off-peak		5¢	22$
Pacific Northwest Network Roaming		▵30¢	75¢

Premier Club Membership benefits include free Voicemail, 10% off accessories, Personal Account Representative for 720+ users and other special offers.

* All minutes billed at lowest earned rate.

Standard	Average user: 2-5 calls per day	Digital	Analog
Monthly access		$69.99	$86.99
Minutes included		180	180
ADDITIONAL AIRTIME			
Peak		181-360 34¢	181+ 42¢
		361+ 30¢	42¢
Off-peak		10¢	23¢
Pacific Northwest Network Roaming		▵34¢	75¢

Occasional	Infrequent user: 0-1 calls per day	Digital	Analog
Monthly access		$24.99	$29.99
Minutes included		30	30
ADDITIONAL AIRTIME			
Peak		31-180 34¢	31+ 52¢
		361+ 30¢	52¢
Off-peak		15¢	25¢
Pacific Northwest Network Roaming		▵42¢	75¢

41. From the this "service plan," an average consumer would reasonably assume that she would receive all of the minutes specified in the second line of each of the foregoing tables for the fixed price. In addition, the consumer would also reasonably assume that, if she spoke for a total of 100 additional minutes, she would be charged only the per-minute rate multiplied by 100. As explained above, this is not the case.

42. AT&T continues to promulgate advertisements that have the capacity to mislead consumers as to the true nature of its charges. For example, in a full page color ad in the November 19, 1995 Seattle Times, AT&T advertised as follows:

A LOW $29.99 MONTHLY RATE

> AT&T cellular service costs just $29.99 per month on a one year contract.
>
> **30 MINUTES INCLUDED**
>
> You get 30 local minutes of airtime each month. So you can call more often.

(Bold in original.)

43. The foregoing advertisement and others like it are deceptive for failing to disclose the practice of rounding. Absent such disclosure the proclamation of "30 minutes included" is misleading and deceptive, because consumers do not get 30 minutes and may get as few as 16 minutes due to rounding.

FIRST CAUSE OF ACTION

Breach of Contract

44. Plaintiffs reallege each of the paragraphs above as if fully set forth herein.

45. Plaintiffs and members of the Class contracted for a prescribed amount of airtime and method of charging for airtime, *ie.*, that they would be billed from "Send to End." These were valid contracts. By engaging in the practice of rounding, defendants have breached these contracts, causing plaintiffs and members of the Class damage.

SECOND CAUSE OF ACTION

Negligent Misrepresentation

46. Plaintiffs repeat and reallege the foregoing paragraphs.

47. Defendants have negligently engaged in the deceptive practices, misrepresentations, and material omissions complained of herein in order to induce plaintiffs and members of the Class to incur charges for airtime they did not use. These misrepresentations, or omissions are contained in brochures

describing Cellular One's and AT&T's service plans, the service agreements, and other advertisements using language similar to that set forth above. Justifiable reliance by the classes should be presumed. To the extent McCaw and/or AT&T purports to have disclosed this practice in advertising and promotional brochures, such disclosures are inadequate and do not meaningfully disclose that (1) airtime under the basic service agreement is based on rounding; and (2) airtime after the basic plan time has been exhausted is based on rounding always to the next highest minute.

48. Plaintiffs and the members of the Class have been damaged as a result of the conduct complained of herein, and the harm or risk of harm is ongoing.

49. Defendants' conduct complained of herein renders it liable as a matter of common law in damages for the consequences of such conduct as well as for appropriate injunctive relief enjoining defendants' unlawful conduct and requiring full disclosure, as set forth in detail below.

THIRD CAUSE OF ACTION

Fraud Under Common Law

50. Plaintiffs repeat and reallege the foregoing paragraphs.

51. Defendants have knowingly, and with intent to induce reliance by the class, engaged in the deceptive practices, material misrepresentations, and material omissions complained of herein in order to induce plaintiffs and the members of the Class unknowingly to pay for airtime that they did not use. Justifiable reliance by the class should be presumed.

52. Plaintiffs and members of the Class have been damaged as a result of the conduct complained of herein, and the harm or risk of harm is ongoing.

53. Defendants' conduct complained of herein renders it liable as a matter of common law in damages for the consequences of such conduct as well as for appropriate injunctive relief enjoining defendants' unlawful conduct and requiring full disclosure, as set forth in detail below.

FOURTH CAUSE OF ACTION

Violation of the Washington Consumer Protection Act and Similar State Statutes

54. Plaintiffs reallege each of the paragraphs above as if fully set forth herein.

55. Plaintiffs' fourth cause of action is for violation of the Washington Consumer Protection Act, RCW 19.86.010 *et seq.* The Washington Consumer Protection Act should apply to protect all consumers in Washington, Idaho, Utah, Oregon, and Alaska because defendants located their headquarters in Washington, and, on information and belief, the false and/or deceptive representations or omissions of fact in defendants' contracts, brochures, and advertisements disseminated in these states were subject to final approval by defendants' Washington headquarters. The state of Washington has an important interest in ensuring that domestic corporations doing business with non-Washington residents fully comply with Washington laws.

56. Each state within the service area of AT&T and/or McCaw has a statute similar to the Washington Consumer Protection Act. To the extent the Court does not apply Washington's Consumer Protect Act to consumers outside of Washington, plaintiffs bring this claim on behalf of consumers in Idaho, Utah, Oregon, and Alaska asserting the equivalent of Washington's Consumer Protection Act for each such state.

57. Defendants' conduct complained of herein is an unfair act or practice that has the capacity to and does deceive consumers into believing that they are receiving a certain amount of basic airtime when this is not the case.

58. Defendants' conduct occurred in the conduct of trade or commerce or the sale of services.

59. The cellular service industry implicates public interest.

60. All the conduct alleged herein occurs and continues to occur in the course of defendants' business. Defendants' conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

61. Plaintiffs and members of the Class have all been directly and proximately injured in their business and property by defendants' conduct complained of herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request, individually and on behalf of all members of the Class, as appropriate, against defendants, for the damages sustained by reason of each of the causes set forth above, an order providing as follows:

A. An accounting of all monies wrongfully received by defendant as a result of the conduct complained of herein;

B. Compensatory damages in an amount to be determined at trial;

C. Punitive damages in an amount to be determined at trial;

D. Penalties as provided under state Consumer Protection Acts;

E. Requiring defendant AT&T to provide adequate notice of the practice complained of herein and allowing consumers who get the notice to void their contracts with AT&T without penalty;

F. Any other injunctive relief the court deems appropriate;

G. Reasonable attorneys' fees, disbursements and costs of this action, including expert and accounting fees;

H. Such other favorable relief as this Court may deem just, equitable or proper.

DATED: Seattle, Washington
June 3, 1997.

HAGENS & BERMAN, P.S.

By /s/_____
Steve W. Berman, WSBA #12536
Sean R. Matt, WSBA #21972
1301 Fifth Avenue, Suite 2929
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APPENDIX D

FEDERAL CASES

D.C. Circuit

Alicke v. MCI Communications Corporation, No. 96-0517 (TPJ), U.S.D.C., D.D.C. [landline long distance]

First Circuit

Casper v. Southwestern Bell Mobile Systems, No. 1:95cv12712, U.S.D.C., D. Mass. [wireless]

Smilow v. Southwestern Bell Mobile Systems, No. 1:97-cv-10307-REK, U.S.D.C., D. Mass. [wireless]

Second Circuit

Birnbaum v. Sprint Communications Company, L.P., No. 96-CV-2514, U.S.D.C., E.D.N.Y. [landline long distance]

Marcus v. AT&T Corp., No. 96-9244, U.S.D.C., S.D.N.Y. [landline long distance]

Moss v. AT&T Corp., No. 96-9256, U.S.D.C., S.D.N.Y. [landline long distance]

Third Circuit

Opalka v. AWACS , Inc., d/b/a Comcast Metrophone (In re Comcast), No. 2:96-cv-02418, U.S.D.C., E.D. Pa. [wireless]

Fifth Circuit

Esquivel v. *Southwestern Bell Mobile Sys.*, No. 95-99, U.S.D.C., S.D. Tex. [wireless]

Pepper v. BellSouth Corporation, No. 3:95-CV-851LN, U.S.D.C., S.D. Miss. [wireless]

Simons v. GTE Mobilnet, Inc., No. H-95-5169, U.S.D.C., S.D. Tex. [wireless]

Seventh Circuit

Cahnmann v. Sprint Corporation, No. 96 C 5129, U.S.D.C., N.D. Ill. [landline long distance]

Ninth Circuit

Smith v. Sprint Communications Co., L.P., No. C96-2067-FMS, U.S.D.C., N.D. Cal. [wireless]

Eleventh Circuit

Brunson v. AT&T Corp., No. 1:96cv01010, U.S.D.C., S.D. Ala. [wireless]

Goforth v. Cellular One, Inc., No. 98-289-CIV-FTM-24D, U.S.D.C., M.D. Fla. [wireless]

Haughton v. Sprint International Communications Co., No. 7:96cv00230, U.S.D.C., N.D. Ala. [wireless]

Ponder v. GTE Mobilnet, No. CV-95-1046-JH, U.S.D.C., S.D. Ala. [wireless]

White v. GTE Mobilnet, Inc., No. 8:97cv01859, U.S.D.C., M.D. Fla. [wireless]

STATE CASES

District of Columbia

Bootel v. MCI Telecommunications Corp., No. 95-8270, Superior Ct. of the District of Columbia [landline long distance]

Alabama

Bennett v. Alltel, No. 96-D-232, Circuit Court of Montgomery County [wireless]

Lee v. Contel Cellular of the South, Inc., No. CV-95-004367, Circuit Court of Mobile County [wireless]

Mann v. Cellular One, No. CV-95-8579, Circuit Court of Jefferson County [wireless]

Moulton v. Alltel, No. 96-D-89-N, Circuit Court of Montgomery County [wireless]

Mobley v. AT&T Corp., No. 25895, Alabama Public Service Commission [landline long distance]

Arkansas

Maddox v. Alltel Mobile Communications of Arkansas, Inc., No. 98-776, Circuit Court of Saline County [wireless]

California

Ball v. GTE Mobilnet of California Limited Partnership, No. 98AS03811, California Superior Court, Sacramento County [wireless]

California Wireless Resellers Association v. Los Angeles Cellular Telephone Company, No. 98-06-055, California Public Utilities Commission [wireless]

Cohen v. AirTouch Cellular Inc. Los Angeles SMSA, No. 972438, California Superior Court, San Francisco County [wireless]

Day v. AT&T Corp., Nos. 976391/976617, California Superior Court, San Francisco County [wireless]

Hagen v. America Online, Inc, No. 971047, California Superior Court, San Francisco County [internet]

Landin v. Los Angeles Cellular Telephone Company, No. BC143305, California Sup. Ct., Los Angeles County [wireless]

Nova Cellular West, Inc. v. AirTouch Cellular of San Diego, No. 98-02-036, Cal. Public Util. Comm'n [wireless]

Powers v. AirTouch Cellular, No. N71816, California Superior Court, North County Branch of San Diego [wireless]

Ross v. Pacific Bell, No. 974081, California Superior Court, San Francisco County [landline long distance]

Delaware

First M. Corp. v. America Online, Inc., No. 14476, Court of Chancery, New Castle [internet]

Sanderson v. AWACS, Inc., d/b/a Comcast Metrophone, No. 96C-02-225, Del. Sup. Ct., New Castle County [wireless]

Florida

Goforth v. Cellular One, Inc., No. 98-3623 CA-RWP, Circuit Court of the 20th Judicial District, Lee County [wireless]

Georgia

Griffin v. AirTouch Cellular of Georgia, No. E55480 Q19/140, Superior Court of Georgia, Fulton County [wireless]

Saba v. AirTouch Cellular of Georgia, No. E56074, Superior Court of Georgia, Fulton County [wireless]

Sharple v. AirTouch Cellular of Georgia, No. E55480, Superior Court of Georgia, Fulton County [wireless]

Smith v. AirTouch Cellular of Georgia, No. E56092, Superior Court of Georgia, Fulton County [wireless]

Illinois

Penrod v. Southwestern Bell Mobile Sys., Inc., No. 96-L-132, Circuit Ct., Third Jud. Dist., Madison County [wireless]

Indiana

Rogers v. Westel-Indianapolis Company, d/b/a Cellular One, No. 49D03-9602-CP-0295, Marion Superior Court [wireless]

Missouri

Halper v. Sprint, No. CV95-22815, Circuit Court of Jackson County, Missouri and Kansas City [wireless]

New Jersey

Carroll v. Bell Atlantic (In re Cellco Consumer Litigation), No. AM-001316-96T3, New Jersey Superior Court, Camden County [wireless]

DeCastro v. AWACS, No. L-1715-96, New Jersey Superior Court, Camden County [wireless]

Kathuria v. Comcast Cellular One, No. L-5079-95, New Jersey Superior Court, Middlesex County [wireless]

Kuhn v. Bell Atlantic (In re Cellco Consumer Litigation), No. AM-001303-96T3, New Jersey Superior Court, Camden County [wireless]

Weinberg v. Sprint Corporation, No. BER-L-12073-95, New Jersey Superior Court, Bergen County [landline long distance]

New York

Porr v. NYNEX Corporation, No. 96-526, Supreme Court of the State of New York, Westchester County [wireless]

Roman v. Bell Atlantic NYNEX, No. 604150/96, Supreme Court of the State of New York, New York County [wireless]

Tolchin v. Bell Atlantic, No. 17136/97, Supreme Court of the State of New York, Kings County [wireless]

North Carolina

Mandell v. Bell Atlantic NYNEX Mobile, No. 97-CV5-6528, North Carolina Sup. Ct., Mecklenburg County [wireless]

Ohio

Kuns v. 360° Communications Co., No. 96-CV-196, Court of Common Pleas, Erie County, Sandusky [wireless]

Pennsylvania

Pennsylvania Bancshares v. Motorola, Inc., No. 95-19136, Court of Common Pleas, Montgomery County [wireless]

Tennessee

Hagy v. Sprint Cellular, No. 6348, Chancery Court for Washington County [wireless]

Texas

Purkey v. GTE, District Court of Jasper County [wireless]

Sommerman v. Dallas SMSA Limited Partnership, No. 96-02150, District Court of Dallas County [wireless]

Winston v. GTE Communication Sys. Corp., No. 95-58377, District Court of Harris County [wireless]

Washington

Hardy v. Claircom Communications Group, Inc., No. 96-2-00574-6, King County Superior Court [airplane telephone]

Lair v. GTE Airfone, No. 96-2-00575-4, King County Superior Court [airplane telephone]

Lair v. US West New Vector, No. 95-2-26309-7 SEA, King County Superior Court [wireless]

Tenore v. AT&T Wireless Services, No. 95-2-27642-3 SEA, King County Superior Court [wireless]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

PATRICK SIMONS, SHEILA FAY, AND JAMIL ELIAS, on behalf of themselves and all others similarly situated in the United States, Plaintiffs, vs. GTE MOBILNET, INC., Defendant	CIVIL ACTION NO. H-95-5169

ORDER OF DISMISSAL

Pending before the Court in the above referenced action, challenging the liquidated damages provision imposing an early termination charge in Defendant GTE Mobilnet, Inc.'s cellular telephone contracts as void because it is an illegal penalty, are Defendant's incorporated Rule 12 motion for judgment on Plaintiffs' first amended original complaint (instrument §29) and

Plaintiffs Patrick Simons, Sheila Fay, and Jamil Elias' unopposed[1] motion for leave to amend (instrument §30).

Defendant moves for dismissal for failure to state a claim under Fed. R. Civ. P. 12(b) or 12(c). Defendant emphasizes that it is not a party to any of the customer service agreements ("CSAs"),[2] containing the disputed early termination clauses, made with any Plaintiffs. Rather the proper defendants, if any, are GTE Mobilnet Service Corporation's affiliates and subsidiaries that are licensed to provide cellular services in Plaintiffs' "primary service areas." Defendant was merely acting as the agent of these principals in entering into the CSAs. Moreover, argues Defendant, Plaintiffs Fay and Elias have not

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[1] According to the certificate of conference included in the motion, Defendant does not oppose the motion but reserve its right to file a supplemental motion to dismiss based upon new allegations in the Second Amended Original Complaint.

[2] Each Plaintiffs' CSA contains the following clause:

> PARTIES: This Agreement is made by GTE Mobilnet Service Corporation, on behalf of its affiliates and subsidiaries, (GTE) *as agent* or reseller *of the cellular network operator (licensee) licensed by the Federal Communications Commission* to serve Customers' primary service area and the individual or organization (Customer) identified on the front of this Agreement [emphasis added].

Defendant points out that documents attached to a Rule 12 (b) action to dismiss that are indisputably authentic and on which the plaintiff's claims are based may be considered by the court. *Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 687 (1994); *Venturo Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Sheppard v. Texas Dept. of Transp.*, 158 F.R.D. 592, 595-96 (E.D. Tax. 1994).

alleged any actual injury,[3] since they are members of their purported Sub-class A that have paid no fees, and therefore have not raised a case or controversy as required by Article III, Section 2, Clause 1 of the United Stated Constitution. As a result this court lacks subject matter jurisdiction over their claims. *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). They must also allege damage or actual injury under section 206 of the Communications Act of 1934, 47 U.S.C. sections 151 *et seq.* (the "Federal Communications Act" or "FCA"), and a failure to do so constitutes a fatal pleading defect. Furthermore, Defendant asserts that Plaintiff Fay and Elias are not adequate class representatives because Rule 23(b)(3) requires putative class members to have suffered actual damages. Finally, regarding Plaintiffs' complaint that Defendant's practices are "punitive" under section 206 and therefore "unreasonable" under section 201(b) because they violated the Texas common law of the liquidated damages, Defendant characterizes it as an improper "attempt to usurp Congress's intent to preempt state law under the FCA, and thereby effectively 'nationalize' Texas common law through this purported nationwide class action." Defendant's Incorporated Rule 12 Motion as 3. Plaintiffs' effort to "shoehorn" the Texas common law of liquidated damages into the FCA and use the FCA to nationalize Texas common law is improper. *Franchise Tax Bd. v. Construction Laborers Vac. Trust*, 463 U.S. 1, 23-24 (1983) (*citing Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)) ("if a federal cause of action completely preempts a state cause of

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[3] Plaintiffs assert that they satisfy requirements under Fed. R. Civ. P. 23(b)(3) for two sub-classes: (1) Sub-class A for customers who have not paid an early termination fee and (2) Sub-class B for those who have paid within four years prior to July 13, 1995. Defendant maintains that members of Sub-class A, which includes Plaintiffs Fay and Elias, have not been damaged because they have not paid any early termination fee.

action any complaint that comes within the scope of the federal cause of action necessarily arises under the federal law"). Defendant emphasizes that there is no evidence of any congressional intent to incorporate the Texas common law of liquidated damages into the FCA. Furthermore Plaintiffs' effort to do so conflicts with the standard of the reasonableness governing the conduct of the common carriers in section 201(b), and allowing state law to interfere with the FCA's regulatory scheme is improper. *Cellular Dynamics, Inc. v. MCI Telecommunications Corp.*, No. 94 C 3126, 1995 WL 221758 (N.D. Ill., April 12, 1995). Cellular carriers' rates and practices are governed exclusively by section 201(B), and Congress has expressly and completely preempted the entire field of rate regulation under section 332(C)(3)(a), making Texas common law irrelevant.

Plaintiffs respond conclusorily that Defendant is a party to the CSAs with the named Plaintiffs and that their First Amended Original Complaint alleges facts sufficient to show that the termination fee provision in those contracts constitutes an unreasonable practice under the FCA. They read the "PARTIES" provision in the CSAs as demonstrating that customers are contracting with the cellular network operator licensed by the Federal Communications Commission, which they assert "upon [unidentified] information and belief" is the Defendant. Even if the Defendant is not the cellular network operator, Plaintiffs argue that there is nothing in the CSAs to evidence that fact and that Defendant's contention that it is not is insufficient to controvert their allegations. They also point to Defendant's registered trademark printed at the top of the front page of each CSA. As for a justiciable controversy, Plaintiffs state that they have deleted their claim for declaratory relief from their proposed Second Amended Original Complaint, attached to their unopposed motion for leave to amend.

Plaintiffs motion for leave to amend indicated that the Second Amended Original Complaint deletes the requests for certification of a national class and requests only certification of a Texas class of individuals similarly situated with the named plaintiff class representatives.

This Court agrees with Defendant that the "PARTIES" provision indicates that it acted as an agent for its affiliates and subsidiaries and that it is not a licensed cellular network operator for purposes of the CSAs. Therefore it is not a proper defendant here. Furthermore because Plaintiffs Elias and Fay have not paid an early termination fee, all their claims, not just their claim for declaratory judgment, must be dismissed for lack of subject matter jurisdiction because they have suffered no injury, have no justiciable controversy, and lack standing to pursue this suit. In addition, regardless of whether the proposed class is nationwide or only Texas-wide, all state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A) of the FCA and Texas law as a standard for unreasonable practices is irrelevant. Moreover Plaintiffs' proposed amendment will not save these fatal pleading defects.

Accordingly, the Court

ORDERS that Plaintiffs' motion for leave to amend is DENIED because amendment is futile and that Defendant's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12 is GRANTED.

SIGNED at Houston, Texas, this 11th day of April, 1996.

/s/

MELINDA HARMON

UNITED STATES DISTRICT JUDGE

APPENDIX F

TENTATIVE RULINGS
Department 53
Sacramento Superior & Municipal Courts
800 H Street
JOHN R. LEWIS, JUDGE
S. SLOCUMB, Clerk
T. MULLENIX, Bailiff
November 17, 1998, 09:00

. . . .

ITEM 9 98AS03811 SUSANNE BALL, ET AL V. GTE MOBILNET OF CA LTD, ET AL

* JNP * Nature of Proceeding: DEMURRER
Filed by: POULOS, JOHN S.

The joinders are granted. The demurrers of all demurring defendants are SUSTAINED without leave to amend on the ground the Federal Communications Act preempts all state regulatory authority over wireless service rates. Plaintiffs are not without a remedy; they may seek a remedy before the FCC or in federal court.

Plaintiffs seek injunctive relief and damages for various practices of the defendants which plaintiffs allege are violative of Business and Professions Code section 17200. These practices are (1) "rounding up" in which a full minute is charged for a part of a minute used, (2) "send to end" which includes charging for nonconversation time, (3) charging for ringing time for complete calls but not for incomplete calls, (4) charging full rates for incomplete calls, and (5) charging for "lag time." Plaintiffs assert that their challenges are not about rates; rather, they relate to billing practices and nondisclosure of such practices. The argument is interesting, but the court is not persuaded by it. The cases relied upon by Plaintiffs are readily

distinguishable. The reasoning of the Federal District Court in the case of In re Comacast [sic] Cellular Telecommunications Litigation, a case which is legally and factually very similar to this one, is here apposite. The plaintiffs in Comcast also attacked the fairness of charges for noncommunication time. The court considered this to be more than just a challenge to billing practices (not necessarily preempted) and noted that plaintiffs were attacking the "reasonableness of the method by which Comast calculates length and consequently the cost of a cellular telephone call. As such, the plaintiff' [sic] claims present a direct challenge to the calculation of the rates charged by Comcast . . . ." The court went on to state "While none of these claims pose an explicit challenge to the rates charged by Comcast for cellular phone service, a careful reading of the complaint and the remedies sought by the plaintiffs demonstrates that the true gravamen of the complaint is a challenge to Conmcast's [sic] rates and billing practices."

Plaintiffs' exploring of a distinction between intrastate and interstate service providers offers no meaningful support to Plaintiff's position. Such a distinction has no relevance to the issue of preemption here. Neither does the Court find persuasive on the issue of preemption Plaintiffs' commentary regarding the "filed rate" doctrine.

This minute order is effective immediately. No formal order pursuant to Rule 391 or further notice of this order is required.

APPENDIX G

STATE OF INDIANA)		IN THE MARION SUPERIOR COURT CIVIL DIVISION, ROOM THREE
	) SS:	
COUNTY OF MARION)		CAUSE NO. 49D03-9602-CP-0295

JOHN M. ROGERS, on behalf of himself and all other similarly-situated parties,

Plaintiff,

vs.

WESTEL-INDIANAPOLIS COMPANY d/b/a CELLULAR ONE,

Defendant.

ORDER

Oral argument by attorneys Mark Rutherford for the Plaintiff and Richard Beckler, Larry Wallace, and Michael Goggin for Defendant, was heard on June 12, 1996. The Court having considered the oral argument and having reviewed the pleadings, briefs, supplemental authorities and responses thereto, now FINDS and ORDERS:

1. Westel's Motion to Stay Portions of Its Motion to Dismiss the Complaint, filed May 17, 1996, is hereby granted.

2. In deciding Westel's motion to dismiss the complaint, filed February 5, 1996, the Court considered only the issues of whether Mr. Rogers' claims are preempted by federal statute and whether Mr. Rogers' complaint should be dismissed under the doctrine of primary jurisdiction.

3. In deciding Westel's motion to dismiss, the Court did not consider Exhibits B and C of Westal's brief.

4. The remedy requested by Plaintiff will in fact require a change of rates and therefore *this* Court does not have jurisdiction. The Court finds that jurisdiction rests with the Federal Communications Commission and/or the federal court, per federal statute.

- THEREFORE, the Defendant's Motion to Dismiss for lack of jurisdiction is granted.

SO ORDERED, ADJUDGED AND DECREED THIS 1 DAY OF JULY 1996.

/s/

Patrick L. McCarty, Judge
Marion Superior Court
Civil Division, Room 3

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APPENDIX H

Number	Clerk		Reporter	
N71816	KARYN STOKKE		TELEPHONIC P.O. BOX 128, SAN DIEGO, CA 921124104	
Date of Hearing	Time of Hearing	Date Complaint Filed	Judge	Dept
10/06/97	02:00 PM	06-25-96	KENNETH O. ZIEBARTH	H
Plaintiff/Petitioner			Defendant/Respondent	
DAVID POWERS			AIRTOUCH CELLULAR	
Attorney for Plaintiff/Petitioner			Attorney for Defendant/Respondent	
ALEXANDER M. SCHACK			DOUGLAS R. TRIBBLE (1)	

1. DEFENDANT DEMURRER

THIS MATTER HAVING COME BEFORE THE COURT THIS DATE, THE COURT ORDERS:

DEFENDANT'S GENERAL DEMURRER TO THE ENTIRE SECOND AMENDED COMPLAINT BASED ON FEDERAL PRE-EMPTION PURSUANT TO 47 U.S.C. § 332(c)(3)(A) IS SUSTAINED WITHOUT LEAVE TO AMEND. CONGRESS HAS MADE CLEAR IN THIS CODE SECTION ITS INTENT TO PRE-EMPT ALL STATE REGULATION OF RATES CHARGED FOR CELLULAR SERVICE.

DESPITE THE AMENDMENTS TO THE COMPLAINT, PLAINTIFFS' ACTION IS STILL A CHALLENGE TO DEFENDANT'S PURPORTED OVERCHARGES IN

RATES. FOR EXAMPLE, IN PARAGRAPH 18 OF THE THIRD AMENDED COMPLAINT, PLAINTIFF ALLEGES THAT IT HAS BEEN DAMAGED BY DEFENDANTS [SIC] "METHODS OF DETERMINING OR CALCULATING THE QUANTITY OF CHARGEABLE AIRTIME USAGE" WHICH HAS CAUSED PLAINTIFF DAMAGE IN THAT IT HAS HAD "TO PAY FOR LARGER QUANTITIES OF CELLULAR TELEPHONE SERVICE THAN . . . ACTUALLY USED". SIMILAR LANGUAGE IS CONTAINED IN THE REQUEST FOR INJUNCTIVE RELIEF CONTAINED IN MANY CAUSES OF ACTION (SEE PARAGRAPHS 41, 50, 56, 61, AND 71).

THESE ALLEGATIONS DO NOT FOCUS ON DEFENDANT'S ALLEGED FAILURE TO DISCLOSE THE "TEARDOWN TIME" CHARGE, BUT ON THE LEGALITY OR REASONABLENESS OF SUCH CHARGES. PLAINTIFFS [SIC] ALLEGATIONS CONSTITUTE DIRECT CHALLENGES TO THE CALCULATION OF THE RATES CHARGES BY DEFENDANT AIRTOUCH FOR CELLULAR TELEPHONE SERVICE AND THUS, THE ACTION IS EXPRESSLY PREEMPTED. (SEE *IN RE COMCAST CELLULAR TELECOMMUNICATIONS LITIGATION*, 949 F.SUPP. 1193 (E.D. PA. 1996, A COPY OF WHICH IS LODGED AS DEFENDANT'S EXHIBIT E.)

THIS RULING DISPOSES OF THIS MATTER IN ITS ENTIRETY.

DATED: 10/06/97

/s/

JUDGE OF THE SUPERIOR COURT

APPENDIX I

ORDER ON MOTION

LARRY	SUPERIOR COURT OF
CARROLL ETC	NEW JERSEY
V.	APPELLATE DIVISION
CELLCO	DOCKET NO. AM-001316-96T3
PARTNERSHIP	MOTION NO. M-006515-96
	BEFORE PART: K
	JUDGE(S): SHEBELL
	DREIER

MOTION FILED:	JUNE 02, 1997
BY:	CELLCO PARTNERSHIP
ANSWER(S) FILED:	JUNE 19, 1997
BY:	LARRY CARROLL
SUBMITTED TO COURT:	JUNE 23, 1997

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 25TH DAY OF JUNE, 1997, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT -- FOR LEAVE TO APPEAL:

GRANTED	DENIED	OTHER
( )	(X)	(X)

SUPPLEMENTAL: We are satisfied that plaintiffs' action is primarily grounded on allegations of fraud and consumer protection and not rate setting. We expect that the trial judge will recognize the limits of jurisdiction as reserved to the States under the "savings clause" of 47 U.S.C. § 332(c)(3)(A), and that,

therefore, rates will not be directly impacted.

-9435-96

FOR THE COURT:

/s/

THOMAS F. SHEBELL JR, P.J.A.D.

APPENDIX J

Decision 98-09-037 September 3, 1998
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Nova Cellular West, Inc. dba San Diego Wireless, Complainant, vs. AirTouch Cellular of San Diego, Defendant.	Case 98-02-036 (Filed February 13, 1998)

OPINION

Summary

Nova Cellular West, Inc. (Nova), a cellular reseller operating in the San Diego area, complains that AirTouch Cellular (AirTouch) refuses to supply it with four promotional plans at lower rates that would reflect electronic billing efficiencies. AirTouch moves to dismiss on grounds that the Commission lacks jurisdiction to adjudge the lawfulness of rates charged by cellular telephone carriers. The motion is granted. The complaint is dismissed.

Nature of Complaint

On February 13, 1998, Nova filed this complaint against "AirTouch Cellular of San Diego,"[1] depositing $37,930.70 in disputed billing amounts with the Commission. Nova filed an amended complaint on March 12, 1998, depositing an additional $17,291.74 with the Commission. On June 12, 1998, Nova filed a second amended complaint that increased the amount of

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[1] Defendant's name is incorrectly stated in the complaint. AirTouch Cellular (U-3001-C) is the cellular operator in the San Diego market and has submitted an answer and a motion to dismiss.

disputed funds deposited with the Commission to $95,689.39. Nova is a customer of AirTouch's cellular service; Nova purchases AirTouch cellular service in volume and resells that service to the public.

Nova alleges that AirTouch refuses to make four promotional access and airtime plans available to Nova at lower rates that would reflect an electronic billing format. While the service packages are available for resale, Nova alleges that the cost to it is higher because none of the packages includes the billing format that creates administrative cost savings. Nova asks the Commission to enjoin AirTouch from continuing to bill and collect from Nova for charges other than under the noted rate plan or such other more favorable plan, and to remove a total of $95,689.39 that Nova alleges was improperly assessed since November 1997.

AirTouch admits the facts of the complaint. It states that its billing system can, for certain rate plans, generate a billing tape in a format that allows a reseller to economically generate bills for the reseller's customers. AirTouch states that it also offers other rate plans, many of them with short-term promotional discounts, and that AirTouch is not able to develop billing tapes in that same format for these rate plans. AirTouch states that resellers may purchase service under these special rate plans, but that they must accept the terms, conditions and service limitations of these plans, including the number of options for the format of bills or billing tapes.

Procedural History

This case was filed on February 13, 1998. Notice of the filing appeared in the Commission's Daily Calendar on February 26, 1998. On March 2, 1998, defendant was instructed to answer the complaint within 30 days. The instructions, a copy of which was served on complainant, assigned the matter to Administrative Law Judge Walker and categorized the case as an adjudicatory proceeding,, as that term is defined in Rule 5(b) of the Rules of Practice and Procedure. Because we have decided to dismiss the complaint on the basis of defendant's motion to dismiss, no scoping memo is necessary, nor is a hearing required. As noted in the instructions to answer, a hearing is not required where the matter "is otherwise resolved by the parties," *i.e.*, through pleadings addressing the motion to dismiss. The categorization of this matter as adjudicatory has not been contested by the parties.

Motion to Dismiss

AirTouch on April 15, 1998, filed a motion to dismiss the complaint. Nova responded to the motion of April 30, 1998. AirTouch moves for dismissal on grounds that (1) this Commission lacks subject matter jurisdiction because the complaint deals with rates charged to a reseller; (2) a similar complaint regarding another AirTouch rate plan was the subject of a 1997 settlement agreement between the parties that purportedly barred subsequent complaints of this nature,[2] and (3) the complaint fails to state a claim upon which relief can be granted. For the reasons set forth below, we agree that the Commission is without jurisdiction to address the rate practices alleged in this complaint, and that such enforcement must be left instead to the Federal Communications Commission (FCC) and to the federal courts. Accordingly, the motion to dismiss for

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[2] *See* Decision (D.)97-05-100, dismissing with prejudice Nova's complaint in Case 96-12-027. A copy of the parties' settlement agreement in that case is attached to AirTouch's motion to dismiss.

lack of jurisdiction is granted. Because of this decision, we do not reach the other grounds for dismissal.

Discussion

In recognition of the rapid growth of the wireless telecommunications services industry, Congress in 1993 amended the Communications Act of 1934, 47 U.S.C. §§151 et seq., as amended, to provide a uniform federal regulatory framework for all commercial mobile radio services.[3] Pursuant to its stated goals of regulatory uniformity and deregulation of the industry, Congress amended Section 332 of the Act to provide:

> "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services." (47 U.S.C.A. §332(c)(3)(A).)

On August 8, 1994, as authorized by the Act, the Commission filed a petition with the FCC to continue the Commission's jurisdiction over the rates of cellular carriers for an 18-month period. On May 19, 1995, the FCC released its report and order denying the petition and, on June 8, 1995, the Commission announced that it would not appeal the FCC's denial.[4]

Consequently, this Commission lacks jurisdiction to hear complaints regarding the lawfulness of rates charged by cellular

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[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 387-97 (1993).

[4] On June 22, 1995, the Cellular Resellers Association sought reconsideration of the FCC's denial. The FCC denied the petition for reconsideration in an order issued on August 8, 1995.

carriers. As the Commission itself has concluded with respect to cellular and other commercial mobile service carriers, "we will not entertain disputes regarding the level or reasonableness of any rate."[5]

Nova argues that its complaint does not involve rate regulation, but is instead a dispute over a billing practice. It states that, based on an FCC interpretation, the Commission may continue to decide complaints relating to "customer billing information and practices and billing disputes and other consumer matters."[6]

While we agree that the Commission retains authority to handle consumer complaints in matters of cellular nonrate terms and conditions of service,[7] the Commission does not have authority to enjoin AirTouch from billing and collecting the rates at issue here, which is the remedy sought by Nova. Indeed, Nova asks the Commission to order AirTouch to adjust

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[5] *Investigation on the Commissions's Own Motion Into Mobile Telephone Service and Wireless Communications*, D.96-12-07 , at 23 (December 20, 1996). A number of judicial authorities support this view. *See In re Comcast Cellular Telecom. Litigation* (E.D.Pa. 1996) 949 F.Supp. 1193 ("any state regulation of [a cellular carrier's rate practices] is explicitly preempted under the terms of the Act."); *Lee, et al. v. Contel Cellular of the South* (S.D.Ala. 1996) 1996 U.S.Dist. LEXIS 19636 (state court action preempted as to "rounding" practice in calculating cellular charges).

[6] *In the Matter of the Petition of the People of the State of California and Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, FCC 95-195. PR Docket No. 94-105 (May 19, 1995), para. 145.

[7] *See* D.96-12-71, Conclusion of Law 10: "The Commission shall continue to monitor the structure, conduct and performance of CMRS carriers, and to handle CMRS consumer complaints, ensuring that facilities-based carriers not restrict in any manner, by way of nonrate terms and conditions, the ability of resellers to purchase or resell cellular or other telecommunications services to the public."

its rates to eliminate approximately $96,000 in charges to Nova. These requested actions would involve the Commission in ratemaking for cellular telephone services, an activity in which the Commission has been preempted. Consequently, the complaint must be dismissed.

Comments on Draft Decision

At the direction of Assigned Commissioner Neeper, parties were given the opportunity to comment on the draft decision in this matter. Both complainant and defendant filed comments on August 14, 1998.

Complainant argues that its complaint seeks to require AirTouch to provide it with electronic billing tapes for four promotional rate plans, and that this constitutes a billing dispute, over which this commission has jurisdiction, rather than a dispute as to rates. It notes that the Commission, in discussing federal preemption in D.96-12-071, stated that preemption would not apply to "eligibility for rate plans" and "scope of service within each rate plan." (D.96-12-071, at 14.) Complainant asserts that those are the issues here. It cites the case of *GTE Mobilnet v. New Par, et al.* (6th Cir. 1997) 111 F.3d 469, as standing for the proposition that alleged discriminatory treatment against cellular resellers under state law is not unequivocally preempted by the FCC.

Defendant argues that the complaint asks the Commission to direct AirTouch to offer Nova particular rates, namely the price made available in certain promotional rate plans to which Nova does not subscribe. Further, defendant states, the complaint asks the Commission to return to Nova the amount Nova alleges was unlawfully assessed, in effect changing *post hoc* the rates AirTouch charged to Nova. Defendant asserts that this type of state commission involvement in cellular rate regulation is prohibited by Section 332(c)(3) of the Communications Act. As to Nova's claim that it seeks only mandatory provisioning of a billing format, defendant cites recent dicta of the United States Supreme Court

stating that "[r]ates,...do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates [or for discriminatory rates] can be couched as a claim for inadequate services and vice versa."[8]

We agree with defendant that the relief requested by complainant requires ratesetting and that the Commission lacks jurisdiction to set cellular rates. The Commission, however, does retain authority over other terms and conditions of cellular service. In this case, mandating that AirTouch provide particular services at given rates is functionally identical to requiring AirTouch to provide its given services at particular rates. Both actions would constitute "rate regulation," and neither remedy is permitted under Section 332. The Sixth Circuit's decision in *GTE Mobilnet* is distinguishable, in that the issue there was whether a federal court should abstain from enjoining state commission action on the basis of preemption out of deference to the ability of the commission and state courts to deal with that question. The Sixth Circuit held that federal abstention was appropriate. As to D.96-12-071, the Commission in Conclusion of Law 10 states that it will continue to monitor restrictive practices of cellular carriers as to "nonrate terms and conditions." (D.96-12-071, at 32.) The undisputed facts of this case make clear that the relief is ratemaking, and therefore is preempted. Complainant should seek its relief before the FCC when its complaint involves AirTouch practices that would require a change in rates.

Findings of Fact

1. Complainant alleges that defendant assesses unlawful rates for at least four cellular service packages.

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[8] *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.* (June 15, 1998) ___ U.S. ___, 118 S.Ct. 1956.

2. Defendant has moved to dismiss the complaint for lack of jurisdiction.

Conclusions of Law

1. Congress in 1993 amended the Communications Act of 1934 to preempt state and local rate regulation of cellular telephone carriers.

2. The gravamen of the complaint is that rates for four AirTouch cellular plans available to complainant are unreasonable in that they do not include an electronic billing format.

3. The Commission has been preempted from prescribing rates for cellular telephone service.

4. The motion to dismiss the complaint for lack of subject matter jurisdiction should be granted.

5. Monies deposited by complainant pending resolution of this matter should be disbursed to defendant.

ORDER

IT IS ORDERED that:

1. The motion of AirTouch Cellular (AirTouch) to dismiss the complaint of Nova Cellular West, Inc., dba San Diego Wireless (Nova), for lack of subject matter jurisdiction is granted.

2. The complaint is dismissed.

3. The money deposited with the Commission by Nova in connection with this complaint, together with interest earned thereon, is to be disbursed to defendant AirTouch.

4. Case 98-02-036 is closed.

This order is effective today.

Dated September 3, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

APPENDIX K

Decision 98-11-016 November 5, 1998
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Wireless Resellers Association, Complainant, vs. Los Angeles Cellular Telephone Company and AirTouch Cellular, Defendants.	Case 98-06-055 (Filed June 26, 1998)

OPINION

1. Summary

California Wireless Resellers Association (California Wireless), representing wireless telephone resellers in the Los Angeles area, complains that Los Angeles Cellular Telephone Company (Los Angeles Cellular) and AirTouch Cellular (AirTouch) refuse to supply certain digital cellular service products on terms and at rates that would qualify as wholesale. Los Angeles Cellular and AirTouch move to dismiss on grounds that the Commission lacks jurisdiction to adjudge the lawfulness of rates charged by cellular telephone carriers. The motion is granted. The complaint is dismissed.

2. Nature of Complaint

California Wireless alleges that Los Angeles Cellular offers digital cellular service to retail customers, but that the conditions of service and rates offered to wireless resellers on some of these digital products "were not and are not wholesale rates and were not and are not offered to the resellers on a wholesale basis." (Complaint, pp. 2-3) Similarly, complainant alleges AirTouch offers its digital service on terms and at rates

that do not constitute reasonable wholesale offerings to resellers.

California Wireless asks this Commission to require defendants to provide digital service to wireless resellers at reasonable wholesale rates, and to require defendants to refund to resellers the difference between the rates actually charged and reasonable wholesale rates.

Los Angeles Cellular and AirTouch deny that they have failed to offer their digital services to reseller customers. They admit that certain contract terms and price discounts are offered on some of their retail plans but not on others, but they deny that this is unlawful. They state that resellers may purchase service under these alternative plans, but that they must accept the terms, conditions and service limitations of the plans.

3. Procedural History

This case was filed on June 26, 1998. Notice of the filing appeared in the Commission's Daily Calendar on July 14, 1998. On July 21, 1998, defendants were instructed to answer the complaint within 30 days. The instructions, copies of which were served on complainant, assigned the matter to Commissioner Duque and Administrative Law Judge Walker and categorized the case as an adjudicatory proceeding. Because we have decided to grant the motions to dismiss, no scoping memo is necessary, nor is a hearing required. As noted in the instructions to answer, a hearing is not required where the matter "is otherwise resolved by the parties," i.e., through pleadings addressing the motion to dismiss. The categorization of this matter as adjudicatory has not been contested by the parties.

4. Motions to Dismiss

Los Angeles Cellular and AirTouch on August 26, 1998, filed motions to dismiss the complaint on grounds that this Commission lacks jurisdiction to require defendants to offer particular rates, wholesale or otherwise, for the services

purchased by resellers.[1] California Wireless responded to the motions on September 15, 1998, arguing that this Commission may regulate terms and conditions of wireless service, and that the obligation to provide wholesale service at wholesale rates is a term and condition of cellular service. For the reasons set forth below, we agree that the Commission is without jurisdiction to address the rate practices alleged in this complaint, and that such enforcement must be left instead to the Federal Communications Commission (FCC) and to the federal courts.

5. Ratemaking Preemption

In recognition of the rapid growth of the wireless telecommunications services industry, Congress in 1993 amended the Communications Act of 1934, 47 U.S.C. §§151 et seq., as amended, to provide a uniform federal regulatory framework for all commercial mobile radio services.[2] Pursuant to its stated goals of regulatory uniformity and deregulation of the industry, Congress amended Section 332 of the Act to provide:

> "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state regulating the other terms and conditions of commercial mobile services." (47 U.S.C.A. § 332(c)(3)(A).)

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[1] AirTouch also moves to dismiss on the basis that complainants has failed to state a cause of action for which relief can be granted. Because we dismiss the complaint on jurisdictional grounds, we do not reach this other ground for dismissal.

[2] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L.No. 103-66, 107 Stat. 312, 387-97 (1993).

On August 8, 1994, as authorized by the Act, the Commission filed a petition with the FCC to continue the Commission's jurisdiction over the rates of cellular carriers for an 18-month period. On May 19, 1995, the FCC released its report and order denying the petition and, on June 8, 1995, the Commission announced that it would not appeal the FCC's denial.[3]

Consequently, this Commission lacks jurisdiction to hear complaints regarding the lawfulness of rates charged by cellular carriers. As the Commission has concluded with respect to cellular and other commercial mobile service carriers, "we will not entertain disputes regarding the level or reasonableness of any rate."[4]

California Wireless argues that the gravamen of its complaint is the obligation of facilities-based cellular providers to make their services available to resellers on a wholesale basis. It argues that the Commission is not precluded from regulating terms and conditions that may relate to rates, and that an order requiring wholesale terms for all defendants' services can be made without setting particular dollar amounts for rates. California Wireless does not explain, however, how wholesale rates can be required without establishing those rates.

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[3] On June 22, 1995, the Cellular Resellers Association sought reconsideration of the FCC's denial. The FCC denied the petition for reconsideration in an order issued on August 8, 1995.

[4] *Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications*, D.96-12-071, at 23 (December 20, 1996). A number of judicial authorities support this view. *See In re Comcast Cellular Telecom Litigation* (E.D.Pa. 1996) 949 F.Supp. 1193, 1203-1204 ("All state regulation of the rates charged by CMRS providers is explicitly preempted by the language of the Act."); *Lee, et al. v. Contel Cellular of the South* (S.D.Ala. 1996) 1996 U.S.Dist. LEXIS 19636 (Communications Act preempts plaintiff's breach of contract claim challenging rounding practices in calculating cellular charges.)

In the recent case of *Nova Cellular v. AirTouch Cellular*, D.98-09-037 (September 3, 1998), the Commission dismissed a similar complaint for lack of jurisdiction. There, complainant argued that while defendant's rate plans were available on a resale basis to complainant, wholesale rates charged for some of the plans did not reflect certain cost savings realized by the defendant. Complainant described the action as a billing dispute and sought a Commission order requiring defendant to charge wholesale rates that recognized the alleged cost savings. The Commission in its decision recognized that, however labeled, complainant's demand inevitably would involve the Commission in "ratemaking for cellular telephone services, an activity in which the Commission has been preempted." (*Id.*, slip op. at 5-6.)

Similarly here, California Wireless does not contend that its members are barred from subscribing to service under any of the plans offered by defendants. Instead, it contends that defendants rates are unreasonable when applied to resellers, and it asks the Commission to impose a "reasonable margin." The type of margin that complainant would have us adopt is undeniably cost-based. This would entangle the Commission in the kind of ratemaking activity that we found in *Nova Cellular* has been preempted.

While we agree that the Commission retains authority to handle consumer complaints in matters of cellular nonrate terms and conditions of service,[5] the Commission does not have jurisdiction to establish wholesale rates for service plans offered by defendants and to other refunds to California Wireless for

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[5] *See* D.96-12-071, Conclusion of Law 10: "The Commission shall continue to monitor the structure, conduct and performance of CMRS carriers, and to handle CMRS consumer complaints, ensuring that facilities-based carriers not restrict in any manner, by way of nonrate terms and conditions, the ability of resellers to purchase or resell cellular or other telecommunications services to the public."

amounts paid in excess of those rates. Since we lack jurisdiction to consider the subject matter in question, the complaint must be dismissed.

Findings of Fact

1. Complainant alleges that defendants unlawfully fail to make certain services available at wholesale rates and terms.

2. Defendants have moved to dismiss the complaint for lack of jurisdiction.

Conclusions of Law

1. Congress in 1993 amended the Communications Act of 1934 to preempt state and local regulation of the rates charged by cellular telephone carriers.

2. The gravamen of the complaint is that rates made available to resellers for certain cellular service products are not wholesale rates.

3. The Commission has been preempted from prescribing rates for cellular telephone service.

4. The motions to dismiss the complaint for lack of subject matter jurisdiction should be granted.

ORDER

IT IS ORDERED that:

1. The motions of Los Angeles Cellular Telephone Company and AirTouch Cellular to dismiss the complaint of the California Wireless Resellers Association for lack of subject matter jurisdiction is granted.
2. The complaint is dismissed.
3. Case 98-06-055 is closed.

This order is effective today.

Dated November 5, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners